IN THE

Supreme Court of the United States.

October Term, 1897.

No. 379.

L. H. HYER, Petitioner,

v.

RICHMOND TRACTION COMPANY, et al.

ON WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Brief of Certain Appellees in Reply to Brief for Petitioner.

W. W. HENRY,
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S. D. SCHMUCKER,
GEORGE WHITELOCK,
Counsel for the Appellees.

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STATEMENT OF CASE.

The original bill in this case was filed by L. H. Hyer in the Circuit Court for the Eastern District of Virginia, at Richmond, on the 30th October, 1895, to enforce against the defendants the following contract, found at top page 6 of the Record. (See prayers of bills, pages 16, 17, 42 and 111.)

New York, August 9th, 1895.

S. H. G. Stewart, Esq.,
40 Wall Street, City.

Dear Sir,—We, the undersigned, L. H. Hyer, of Washington, D. C., and Phil. B. Sheild, of Richmond, Va., have this day entered into the following agreement: That both of us being interested in the procuring of a franchise for and the construction of a street railway on Broad Street, in the city of Richmond, Virginia, with collateral lines, have made the following agreement: That we hereby bind ourselves, in our own behalf and for our associates, mutually to co-operate one with the other in securing a franchise for said railway and to divide equally between us and our associates whatever may be realized from the enterprise, first deducting from said amount whatever actual expenses may have been incurred by either side, such expenses to be paid out of the first money realized from said enterprise.

It is further agreed between us that the deposit already made with the State Bank of Richmond, at Richmond, Virginia, by Mr. L. H. Hyer or his associates, is to stand and remain intact as it now is for the purpose of securing the franchise aforesaid, subject to any conditions for the withdrawal thereof made by Mr. Hyer with the depositor after the seventeenth day of August, 1895; and further, it is agreed that the application and franchise to be presented to the Common Council of the City of Richmond shall be that of the Richmond Traction Company, for the building of an overhead trolley railway or cable system.

Among ourselves we will decide what names are proper to be used in the franchise and the policy we will use in procuring the same.

Yours very respectfully,

[Signed] L. H. HYER.
[Signed] PHIL. B. SHEILD.

The plaintiff afterwards filed amended bills, hereafter to be noticed, but all of his bills were dismissed on demurrer by

Judge Goff, sitting in the Circuit Court (page 119). Thereupon he appealed to the United States Circuit Court of Appeals, at Richmond, Va., which Court affirmed the decree of the Circuit Court (page 145). The case is here now on *certiorari* granted on the petition of the said L. H. Hyer.

In order to a proper understanding of the said contract and the grounds of defence, the circumstances leading up to it, the acts of the parties in execution of it, and the conduct of the complainant in the conduct of his suit should be related. And this is the more important as the opening brief filed for the petitioner is very defective in its statement of material facts, and misleading in some of its parts. On behalf of those of the defendants represented by us, we therefore submit the following as an accurate statement of the facts disclosed by the record, condensing without omitting what is deemed material to the cause:

On the 17th of June, 1895, an ordinance of the Council of the City of Richmond was approved by the Mayor, which granted to L. H. Hyer and his associates, under the corporate name of the Richmond Conduit Railway Company, a franchise to construct and operate a street railway along Broad street and connecting streets in the said city. (Record, top p. 84).

Owing to certain provisions in said ordinance, not approved by the said Hyer, he declined to accept the same without certain amendments which he proposed, and which he was assured by the Committee on Streets of the said Council would be engrafted upon the ordinance, provided he would procure to be deposited in one of the banks of the city of Richmond the sum of ten thousand dollars upon conditions embodied in a paper to be prepared by the City Attorney, which deposit he caused to be made in the State Bank at Richmond (pp. 84–85). Said amendments had been in fact adopted by the said Street Committee (p. 89). The word "Conduit" is a technical phrase which indicated, that the proposed motive power in the scheme presented by Hyer, was to be electricity along wires placed underground, by what is known as an "underground electric system." See Booth on Street Railways, §66. While the

said ordinance and its proposed amendments were pending, a rival and competing scheme was presented to the said Council by parties represented by the appellee, P. B. Sheild, who sought the said franchise for an electric street railway along said Broad and connecting streets under the name and style of the *Richmond Traction Company* (pp. 3 and 85). These parties proposed to build an electric street railway of the overhead trolley system (pp. 6, 87 and 21). The said competing schemes were therefore to have their propelling power applied in different ways, the *one underground* the *other overhead*.

There were other grounds of competition also. By the Act of the Virginia Legislature of 20th March, 1860, under which the Council of Richmond was authorized to contract for railroads in its streets, such contracts were to be "under such provisions, limitations and restrictions as the Council may prescribe." (See appendix to brief.) In prescribing these the City Council would of course seek such conditions as would be most valuable to the City. And in the interest of the public, in case of competition, such provisions, as the rate of taxation measured by commissions on receipts, the rate of fares for school children and others, and the amount of work to be done on the streets, would be put up to the highest bidder.

In this competition the petitioner and his associates seemed at first to have, in his own language, "the inside track," and to be "masters of the situation" (p. 4). The policy of Shield under these circumstances is thus described by Hyer: "If Sheild, for his Traction people, could but get the conduit franchise out of the way, get the use, the benefit, or the credit of their $10,000.00, and also get the conduit workers, who seemed to have the ear of the Council, committed to the traction scheme, the field was won: otherwise there was no chance. There was but one way to accomplish these ends, viz: to embarrass as much as possible the progress of the conduit scheme, and to promise everything to its promoters if they would agree to the substitution of the Traction ordinance in place of theirs. And this way was adopted" (pages 7 and 8).

For the purpose of carrying out his proposed contract with

the city under the said ordinance, to be amended as aforesaid, the petitioner had secured the co-operation or assurance of adequate capital (page 84). In the early part of August, 1895, he was in the city of New York engaged in *perfecting* his arrangements for prompt and vigorous action under his *conduit ordinance*. He was introduced by Mr. Stewart, his banker, to the said P. B. Sheild, who had applied to the same banker for aid in behalf of the proposed Richmond Traction Company scheme. This introduction was at the solicitation of the said Sheild, who declared that he desired if possible, to consolidate the interests of the two companies, and the circumstances are thus described in the original bill (page 5):

"The said Stewart then advised your orator (the petitioner) that rivalry between the conduit company and your orator and his associates on the one hand, and the Traction people and the said P. B. Sheild and his associates on the other hand, and antagonism of this character, would probably result in the defeat of both their schemes, or the passage of the franchise in favor of one of the two competitors loaded with such onerous and exacting conditions that no capitalist could be induced to put money in the enterprise, and he therefore urged your orator to shake hands with the said Sheild, to unite forces with him upon one of the two ordinances—the Conduit ordinance or the Traction ordinance—and thus to secure and share the fruits of victory instead of the disappointment and bitterness of defeat. Mr. Sheild and your orator, realizing the wisdom of this council, were then and there introduced by Mr. Stewart, and after some conference, parted to meet later at your orator's hotel, having arrived at a general agreement that the promoters of the Conduit scheme, represented by your orator, and the promoters of the Traction scheme, represented by the said Sheild, co-operate and share equally in the profits of the enterprise. The late rivals, now allies, met as arranged. * * The result of this conference was embodied in a contract which took the form of a joint letter * * to S. H. G. Stewart." (See letter, page 6, heretofore recited.)

The actual expenses to be repaid to the petitioner under this agreement are stated to be between $3,500.00 and $4,000.00 (pages 2 and 84). The petitioner, after the signing of the said contract, endorsed upon a draft of the Traction ordinance, a request or direction to his friends in Richmond to give it their hearty support. Upon the request of Sheild that the names of the petitioner and of one or two of his associates be furnished to insert in the ordinance, the petitioner the next day wired to his friends in Richmond the names he had selected, one of whom was then in Richmond at work on the Conduit scheme, "who, with your orator's entire working force, went over at once to the Traction side openly and heartily" (page 8). "The Conduit ordinance was publicly withdrawn before the Street Committee, in the presence of workers from both sides" (page 8). For a day or two subsequent to the signing of the said contract, Sheild and Company several times wired the petitioner as to sundry details, especially urging him to see that the $10,000.00 on deposit in Richmond should be detained there till the meeting of the Council, which was done, though he did not receive the telegrams, having gone to Washington (pages 9, 90, 91), and being there detained by sickness. In the last amended bill, filed after the demurrer to the original raised the question of public policy, much of the language of the original bill above cited is omitted, as *loose and careless expressions* (page 73), and other words are added, with the expressed purpose of correcting any impression that other "than proper and legal influences and the utmost candor and publicity was intended or practiced in the making and carrying out of the said contract." But in making the changes, the effort was also made to cover up this competition and the motives which led to its withdrawal. For instance, the following is the account of the arrangement between the parties given in the last amended bill (page 88):

"Hyer agreed that the Traction ordinance should take the place of his Conduit franchise. A candid statement and explanation of this action was to be made before the Street Committee or the Council of the city of Richmond, and Sheild,

acting in behalf of himself and his former associates, and also in behalf of your orator and his associates, was to apply to and secure from the Council of the city of Richmond the franchise set out in said contract of August 9, 1895, and your orator was to keep the $10,000.00 in Richmond until the 17th day of August, 1895, but subject to the conditions set out in said contract." So (page 86) the reasons advanced by Stewart for uniting on one of the ordinances are omitted, and simply his advice to do so is stated. Then again all about "the inside track" and "the working force of the petitioner," and Sheild's "want of influence with the council," contained in the original bill, is omitted. These changes will be reverted to in the argument, however, and need not be now fully set forth here.

On the 14th day of August the appellant sent his associate, William H. Duehay, to Richmond to learn the situation. He arrived the day that the Board of Councilmen met to consider the proposed Traction ordinance, which was duly passed by that branch of the Council. And afterwards the said Duehay returned to Washington and reported to the appellant that the situation was not satisfactory (pages 9, 90–91). Thereupon the appellant, on or about the 23d of August, came to Richmond, interviewed said Sheild, and they came to an open rupture (pages 10, 91–92). Afterwards, on the 26th day of August, 1895, on the night of which day the Board of Aldermen was called upon to act, and did act upon said ordinance, the appellant published the following card in the "State" newspaper, a paper published in the afternoon in the city of Richmond, thereby giving no opportunity for a public reply before the meeting (pages 11, 92–93):

"Mr. Hyer Charges Disagreement Amongst Traction Company's People—Threatens to Bring Suit."

"Mr. L. H. Hyer, one of the interested parties of the Richmond Conduit Company, and the fully authorized attorney and agent of that Company, was seen by a reporter of the *State* and asked if he was interested in the present Traction Company's franchise, now before the Board of Aldermen.

To which he replied that he had a contract with the Traction Company for one-half interest of their franchise, when such franchise was granted."

"What is the consideration of this contract you hold?"

"I was to cause the withdrawal of the Richmond Conduit Company's application for franchise in favor of the Traction Company, which was done in due form before the Street Committee. There are a few other minor details, all of which have been complied with."

"Is the Traction Company under contract with any one else?"

"I am reliably informed they are."

"What do you know of these other contracts?"

"One is with Stewart & Company, Bankers, No. 40, Wall Street, New York, who, I am informed, hold a binding proposition for one-third interest in the franchise, and I have reason to believe that an effort will be made on the part of Stewart & Company to hold the Traction Company to this proposition. I am also informed that on the 19th of August a contract was entered into with W. F. Jenkins, the terms of which, it is said, are that he is to have about one-half interest in the franchise for his services in securing the said franchise. It has also been stated to me that the Company has agreed to turn over to certain bankers of this city the greater portion of this franchise for financiering the same."

"What is your idea of the outcome of these complications?"

"I can only answer for my associates and myself. If the Board of Aldermen pass the franchise to-night, as I hope and believe they will, it is my intention to retain able counsel before leaving the city to prevent any further transaction on the part of the Traction Company, from bond or stock transfers, until they have complied with the terms of the contract."

"I should infer from the above that there is lack of harmony in the Traction Company?"

"My impression is that all of these conflicting contracts have caused discord among the parties at interest, and I am afraid

these complications will lead to litigation which will prove fatal to the enterprise, which I will regret to see with my financial interests at stake.

"I have just received a telegram from Stewart & Co., of 40, Wall Street, New York, saying they have a binding contract dated August 9th."

On the evening of the 27th of August Mr. John Skelton Williams, afterwards President of the Traction Company and a member of the firm of John L. Williams & Sons, the largest stockholders, published in the same newspaper the following reply, (pp. 13, 94):

"I never heard of Mr. Hyer until he came out in last evening's *State* with those preposterous statements. I immediately took the matter in hand to see whether there was the slightest foundation for them, and was not long in satisfying myself that his claims could not be sustained, that his action was based on the flimsiest assumptions, and was probably inspired by the enemies of the Traction Company, who hoped to spring this surprise last evening at a critical time, with the object of casting doubts upon the plans and purposes of the Richmond Traction Company. His statements are not worthy of any attention."

"Will his threat of employing counsel to defend his rights in the matter interfere in any way with your plans? was asked Mr. Williams. 'Not in the slightest degree,' he replied. 'It may really be said we have already begun our work, that is to say, the office work, the engineering work. The preparation of plans, and so forth, is already now well under way, and very soon after the Mayor attaches his name to the ordinance, and it becomes a law, the actual physical construction of the road will be at once begun, and pushed to completion much more rapidly than the time allowed in our franchise. We shall pay no more attention to Mr. Hyer than we would to some unconcerned and disinterested person who might appear on the scene now for the first time and request a gratuitous interest in our enterprise.'"

The ordinance was approved August 28th, 1895, and was in force from its passage (pp. 17 to 26). ("Ordinances and Certain Resolutions of the Council of the City of Richmond, July 10th, 1894, July 1st, 1896"—page 78.) By the provisions of the said act of the 20th of March, 1860, the persons named in the ordinance as permitted to construct and operate the said Street Railway were created a corporation *instanter*, with the power and duties as such, and for the time prescribed by their agreement with the said Council, and were governed by the provisions of chapters 56 and 57 of the Code of Va., of 1849, in force at the date of the said Act, so far as the same were applicable to such corporations and not inconsistent with said Act. By Section 4 of the said Act the corporators were authorized to open books of subscription for stock of the said Company "at such places in the City of Richmond, for such time, and on such advertisement as may seem best to them." And by Section 5 of the said Act the Company was authorized "to borrow money and issue bonds, bearing interest, at not exceeding 8 per cent. per annum, and secure the same by a deed of trust or mortgage upon the whole or any portion of their property, and to use the money for the purpose of building and construction." By the said ordinance, paragraph 2, page 18, the Richmond Traction Company was required to begin its work on Broad Street within ten days from the time the ordinance took effect, to-wit: by the 7th of September, 1895, push the same diligently without interruption or cessation towards conclusion, and within nine months from the date of the ordinance have its cars in operation upon the said entire Broad Street route. But before beginning said work the Company was required to deposit ten thousand dollars in city bonds or U. S. currency with the Treasurer of the city, the said amount to be forfeited to the city if the Company failed to begin its work within the said ten days, or to complete the same within the said nine months. This was a different sum from that mentioned in the contract then *to the credit of the depositor* in the State Bank and to remain there until the 17th of August, for this sum was to be subsequently deposited *with the*

City Treasurer and to be subject to his order. And the Company was also liable upon such failure, or upon the failure to properly prosecute the work with due diligence for the space of ten days during the said nine months, to forfeit to the city each and every one of the privileges granted in the said ordinance, and also all of its track which it might have laid.

A notice, dated Richmond, Va., September 3, 1895, was served on the corporators of the said Richmond Traction Company, but at what time served does not appear, in the following words (pages 14, 95):

"RICHMOND, VA., September 3, 1895.

"To John W. Middendorf, John L. Williams, Everett Waddey, R. Sherreffs, P. B. Sheild, C. T. Child and W. F. Jenkins, and through them to each and every party, who, on or since the 9th day of August, 1895, has been associated with them, or with any or with either of them, in the premises.

"Take notice, that L. H. Hyer, in behalf of himself and associates, claims to be entitled to a full one-half interest in the franchise recently granted by the City Council of the city of Richmond, Va., to John W. Middendorf, John L. Williams, Everett Waddey, R. Sherreffs, P. B. Sheild, C. T. Child and W. F. Jenkins and associates, to build and operate an electric street-car line in the said city, on Broad and other streets, said interest being claimed under a contract bearing date August 9, 1895, entered into between P. B. Sheild and associates, through P. B. Sheild and L. H. Hyer, in behalf of himself and associates, one original of which is in the hands of said P. B. Sheild and one is in the hands of Stiles & Holladay, Attorneys at Law, 1014 East Main Street, Richmond, Va., the latter being open to your inspection; and, if the rights of the said L. H. Hyer and associates are not recognized and conceded, that they intend forthwith to apply to the courts to enforce their rights in the premises.

"This formal notice is not intended as an implication or

even admission that you have not all along been aware of the rights and claims above asserted.

"L. H. HYER,
"By Stiles & Holladay,
"Attorneys."

The third amended and supplemental bill (page 99) alleges that some time in September, 1895, the incorporators met at the banking house of John L. Williams & Sons, in the city of Richmond, signed their names to a subscription list, by which they agreed to take three hundred thousand dollars of the capital stock of the Company, which was the maximum allowed by the said act of the 20th of March, 1860. Notwithstanding the notification in the said notice of the 3d September to the incorporators, that if the rights of the said L. H. Hyer (the appellant) and associates were not recognized or conceded, they intended to enforce their rights in the premises; and notwithstanding the fact that the defendant company was required to commence its work by the 7th of September, and of course previously to organize and to make monetary arrangements, and to make contracts and to purchase material before that date; and notwithstanding the fact that the complainant and his associates were notified by the said card of the said John Skelton Williams, of the 27th of August, that their claim to one-half of the franchise granted the Traction Company would not be allowed, it was the 30th day of October, 1895 (page 1), before the appellant, L. H. Hyer, describing himself as a citizen of Missouri, while his contract described him as a citizen of Washington, D. C., filed his bill against the incorporators, together with A. B. Guigon, Edmund Pendleton and Louis Euker, said to be interested in the trust imposed in W. F. Jenkins' trustee, defendants. This bill claimed for Hyer alone, one-half of the said franchise (pages 14–15), the said claim being based upon alleged transfers from his said associates, but neither the said transfers nor the names of his associates are given, except the name of W. F. Jenkins for himself and as

trustee for certain persons; and it is alleged that the said Jenkins had abandoned said rights, and that they no longer exist against or in diminution of the rights of the appellant. The contracts between the appellant and his associates are not given.

In the said original bill the appellant plainly stated that the Richmond Traction Company was a *rival and a competitor* for the control of the said Broad Street franchise; and that the appellant and his associates were *masters of the situation* (page 4). He also stated that the object of the said Sheild in seeking the said alliance was to get the Conduit franchise out of their way; to get the use of the ten thousand dollars deposited; and "also to get the Conduit workers, who seemed to have the ear of the Council, committed to the Traction scheme" (page 7). The appellant also stated that after the said agreement and upon his direction *the appellant's "entire working force went over at once to the Traction side openly and heartily;"* and that "the Conduit ordinance was openly withdrawn from the Street Committee in the presence of workers from both sides" (page 8).

The said original bill, after setting out the said contract, publications, notice and ordinance (pages 6, 11, 13, 14 and 17), claimed a full one-half interest in the Traction Company's enterprise and franchise, and prayed that "each and all of the parties defendant, their agents and servants, be enjoined and restrained from transfering or encumbering the franchise or property of the said Richmond Traction Company, or any part thereof, or any interest therein, or from issuing any stock or bonds of said Company, or in any other way borrowing money upon its franchise or property;" and for specific enforcement of said contract and general relief (pages 16, 17).

On the 31st day of October, 1895, the day after said original bill was filed, a general demurrer was filed on behalf of defendants (page 27). On the 14th of November, 1895, leave was granted the appellant to amend his bill in certain particulars (pages 26, 27).

The said original bill was signed by the appellant in person (page 17), but none of the several amended bills has

been so signed. Neither the said original nor amended bills have ever been presented to a judge in vacation or in court with an application for immediate injunction until the final hearing on the 5th of May, 1896, when the case was argued upon demurrer (page 119), and when the work of construction on Broad Street was about complete. But without asking for a hearing of the demurrer, on the 4th day of February, 1896, the appellant, by leave of court, filed an amended and supplemental bill, which was at once demurred to, and the said demurrers were set down for argument during the then term (page 29). The said amended and supplemental bill alleged for new matter, that the said corporators, without following the requirements of law by giving legal notice of the time and place, had met and subscribed among themselves to all of the capital stock of the said Traction Company; that no actual payment had been made therefor; that an illegal organization of the Company had been had (pages 32–33); and that on the 1st day of November, 1895, the said illegal organization had directed the issuing of bonds to the amount of $500,000, and of a mortgage upon the property of the Company to the Maryland Trust Company as trustee to secure the same; and had directed a negotiation and a sale of the said bonds (pages 34 and 35), and filed as an exhibit a copy of the said mortgage (pages 45 to 63). All of these acts the appellant charged were unlawful and were done with an intention to hinder, delay and defraud the appellant (page 36). Whereupon the appellant charged that all persons participating in the said meetings, either in person or by proxy, were jointly and severally liable to him for all loss that might result from their action. As an evidence of the fraud claimed to have been perpetrated, the appellant cited the provision in the bonds (page 39) whereby the "holder agrees that no recourse shall be had for its payment to the individual responsibility of any stockholder, director or officer of the mortgagor by reason of any liability whatsoever incurred by or imposed on him by virtue of any law or statute which may now or hereafter be in force," a provision also contained in the mortgage.

The said amended and supplemental bill charged that the appellant would be exposed to irreparable injury as follows:

"Yet, notwithstanding the personal liability of the said parties to him, your orator is advised and charges that he will be exposed to irreparable injury, unless the court interfere by injunction to prevent the further negotiation and sale of the bonds issued by the Richmond Traction Company and the further expenditure of the money received for such sale, and the making and execution of contracts in its name, and appoint a receiver to take charge of all property and assets of the said Company." (p. 42.)

And the appellant prayed for the relief asked for in his original bill; that the said subscriptions to the capital stock of the Richmond Traction Company be decreed to be illegal, null and void; that the script for the same be delivered up and cancelled; that the organization of the said Company be vacated as illegal, null, and void; that the said mortgage be set aside as illegal, null and void; that all the bonds secured by it which had been negotiated and sold, be called in and cancelled; that persons participating in said illegal acts be held liable for all loss and damage which had accrued, or might thereafter accrue to him; that said Richmond Traction Company and its franchise be discharged from all contracts, debts and liabilities contracted in the name of the said Company; that the said Maryland Trust Company be restrained from performing its duties as trustee under the said mortgage, and from selling or otherwise disposing of any of said bonds; that a like injunction be issued against the Richmond Traction Company and its agents, which injunction shall extend to the exercise of any of the rights, powers, functions or privileges of said corporation; and that a receiver be appointed to take charge of all the property and assets of the said Richmond Traction Company, of whatever character and wherever it may be found and for general relief. (pp. 43-44).

Taken in connection with the prayer of the original bill, which was repeated, the prayers of the appellant were for the

annulment of all obligations of the Richmond Traction Company, and a division of its assets into two parts, one of which should be decreed to the appellant. Upon the filing of this supplemental bill, to-wit: on the 4th of February 1896, the defendants filed a demurrer and specified the causes therefor under nine heads (pp. 63, 64).

Whereupon on the 11th day of February the Court ordered a hearing of the cause on the first day of April, 1896. In the meantime, the appellant, realizing the force of the demurrer, as stated under the said heads, presented a petition to the Judge of the Circuit Court which was granted by an order of the 6th of April, 1896, asking leave to amend his original and supplemental bill by striking out from the same, amongst other expressions, statements relating to *competition* between the two companies seeking said franchise, *the influence obtained* over the Council by the *working force* of the Conduit Company, and the turning over of the said *working force* to, and its working in favor of the Traction Company *with the Council*, after the said contract of 9th of August, 1895; in fact attempting to eliminate all statements which had admitted illegal conduct on the part of the appellant and his associates, in fulfilling their contract of the 9th of August, as has been stated.

The appellant asked leave also to insert new matter on the same line, and also charged (pp. 76-77 and 106-107), that the said Act of the Va. Assembly of 20th March, 1860, was "unconstitutional and void, so far as it undertook to delegate to the City Council of the City of Richmond the authority to prescribe and define the powers and duties of the Richmond Traction Company, and that all the powers attempted to be conferred by the said act on Companies to be formed under it, save and except the power to construct railroads in the streets of said city, are void, because they are not embraced or expressed in the title of said Act, as required by section 16 Art. 4 of the Constitution of Virginia in force at the time of the passage of said Act, which said section provides that "no law shall embrace more than one object which may be expressed in its title."

The title of said act is: "To authorize the Common Council of the city of Richmond to authorize persons to construct railroads in the streets of said city." They also inserted (p. 106) the allegation that the said mortgage was executed in violation of section 1232 of the Code of Va. 1887, which forbids certain companies to borrow money until they have expended the whole amount of capital stock subscribed. The petition to amend was granted and a hearing fixed for the 6th day of May, 1896. To the bill so amended the defendants filed a demurrer, specifying for cause the same which had been previously specified, and adding a tenth head, to the effect, that the said amendments had materially changed the very substance of the former bill, and were an attempt to make a new and different case (pp. 114-115.)

By the decree of the Circuit Court, entered the 22d of August, 1896 (pages 119, 120), the Court overruled the first three grounds of demurrer, but sustained the fourth, making its opinion a part of the decree (see pages 116 and 117) and dismissing all of the said bills, without considering the six remaining grounds of demurrer. In said opinion the learned Judge based his decision upon the illegality of the contract in withdrawing competition for the franchise from before the City Council of the city of Richmond (page 117).

On the appeal to the United States Circuit Court of Appeals, that Court affirmed the decree of the Circuit Court, but based its decision on the ground overruled by that Court, to-wit: that the petitioner's remedy, if any he had, was at Law, and not in Equity (page 141). Simonton, Cir. J., sitting in the United States Circuit Court of Appeals, concurred with the Circuit Court that the contract sued on was against public policy and void. Brawley, Dis. J., dissented, and seemed to think that the remedy of the petitioner is solely against Sheild (page 145). The Chief Justice gave no opinion on any point except as to the remedy, and both he and Simonton, Cir. J., concurred in holding that this, if existing, was at Law, and not in Equity .As this denied the equity jurisdiction, the Chief Justice might well refrain from investigating the question of public policy, and that he gave no opinion on it, is not to be taken as

an indication of his disagreement with Simonton, Cir. J., upon the question of public policy.

ARGUMENT.

At the threshold of the argument we wish to call the attention of the court to the fact, that this brief is not filed on behalf of P. B. Sheild, the party to the contract with the petitioner, of the 9th August, 1895, but on behalf of the parties who embarked in the enterprise therein described without a knowledge of the existence of the petitioner, much less of his contract with Sheild, until his card appeared in "The State," 26th August, 1895, and who, on investigation, were convinced that the petitioner had no ground for his claim. See card of John Skelton Williams, President of the Traction Company (page 94).

We propose to argue the following grounds of defence:

1. The right to use the statements of the original bill omitted in the last amended bill.

2. The contract sued on is against public policy, being for the withdrawal of competition for a public franchise and for the use of improper means in obtaining the said franchise, and does not fall within the class of contracts represented by ***Brooks*** vs. ***Martin***, 2 Wall., 70.

3. The petitioner has a plain, adequate and complete remedy at Law, if any he has, and therefore Equity has no jurisdiction.

4. Plaintiff's conduct and the relief he seeks are inequitable, and the prayers of his bills cannot be granted.

5. The contract is one between promoters, which cannot be enforced against the defendants.

6. Quo warranto should have been resorted to in the attack upon the corporation.

Before entering upon the argument of the grounds most elaborately discussed by our learned opponents, it is deemed proper to call attention to

The Force of a Demurrer,

which seems to be so misconceived in their brief. The rule is stated as follows in *Dillon* v. *Barnard*, 21 Wal., 437: "A demurrer only admits facts well pleaded; it does not admit matters of inference and argument, however clearly stated; it does not admit, for example, the accuracy of an alleged construction of an instrument when the instrument itself is set forth in the bill or a copy is annexed, against a construction required by its terms; nor the correctness of the ascription of purpose to the parties, when not justified by the language used. The several averments of the plaintiff in the bill as to his understanding of his rights, and of the liabilities and duties of others under the contract, can, therefore, exert no influence upon the mind of the court in the disposition of the demurrer." See also *U. S.* v. *Ames*, 99 U. S., 45–6.

This definition of the scope of the admissions of a demurrer, excludes a good deal of the lengthy brief filed for the petitioner. We would next notice

The Right to use the Omitted Statements of the Original Bill.

The brief for the petitioner calls attention to the fact that Simonton, Cir. J., used some of these omitted statements in his opinion, but it fails to state that Brawley, Dis. J., in his dissenting opinion, so much relied on, also recites one of the most important of these statements as a fact to be considered upon the demurrer to the amended bill. This appears in Judge Brawley's statements in the following sentence (page 142), which was taken from the original bill, as they will be found to have been omitted from the last amended bill, the demurrer to which was under discussion:

"Stewart (the New York banker), fearing that the continued rivalry might result in the defeat of both, or in the obtaining of a franchise of such nature that capital would not embark in it, advised the parties to come together, and they

united in an agreement for mutual co-operation and for an equal division of whatever profits were realized."

This use of the original bill on a demurrer to an amended bill is justified by authority. It was said in *French* v. *Hay*, 22 Wal., 246, that "an amended bill is esteemed a part of the original and a continuation of the suit. But one record is made." This was also held in *Excelsior Peble Co.* v. *Brown*, Circuit Court of Appeals for 4th Circuit, 20 C. C. A. 428.

See also in confirmation—

1. *Daniel Ch. Pr.*, 402 (Ed. of 1871).
Munch v. *Shabel*, 37 Mich., 166.
Ogden v. *Moore*, 95 Mich., 290.
Carey v. *Smith*, 11 Ga., 539.
Cooley v. Plimpel, 37 Atl. Rep. 792.

The Last Amended Bill Should not Have Been Allowed to be Filed.

But the whole case was before the Circuit Court of Appeals and is now before this Court, and we insist that the 10th ground of demurrer to this last amended bill should be sustained. It is in these words (page 115): "* The second amended bill of the complainant Hyer materially changes the very substance of his original bill, and is an attempt to make a new case."

As the first amendments were only a few verbal ones, not objected to, the last bill filed is here treated as the *second amended bill* (see page 81, &c.).

In *Verplanck* v. *Mercantile Ins. Co.*, 1 Edw. Ch. 52, besides inserting a new name, the complainants proposed to strike out the whole stating part of the bill (except the recital of the charter), the interrogation part and the prayer, and to insert as a substitute and by way of amendment, not a statement of a new matter entirely, but a restatement of the original matter in a different phraseology; leaving out some of the allegations or portions thereof; introducing some new and additional matter.

The Vice Chancellor said: "Under the privilege of

amending, the party is not to be permitted to make a new bill. Amendments can only be granted when the bill is found defective in proper parties in its prayer for relief, or in the omission or mistake of some fact or circumstance connected with the substance of the case but not forming the substance itself."

This is also stated to be the rule by Chancellor Kent in *Lyon* v. *Tallmadge*, 1 John, Ch. (N. Y.), 184; and in *Shields* v. *Barrow*, 17 How., 144, the doctrine of these cases is approved. Curtis, J., said: "Amendments can only be allowed when the bill is found defective in proper parties, in its prayer for relief, or in the omission or mistake of some fact or circumstance connected with the substance of the case, but not forming the substance itself, or for putting in issue new matter to meet allegations in the answer."

Goodyear v. *Bourn*, 3 Blatch (U. S.), 266.

In *Metro. Nat. Bk.* v. *St. Louis Dispatch Co.*, 38 Fed. Rep., 57; where the original bill was to foreclose a mortgage on tangible property, and two amended bills alleged that the tangible property had been destroyed, and it was therefore held that the complainant could obtain no relief in that suit; it was held that leave to file a third amended bill alleging the existence of the tangible property, for the purpose of reaching the intangible property should be denied.

Mr. Justice Brewer said: "Where an amended bill is sought to be filed, which is based upon allegations contradicting those in the prior bill, those allegations being of substantial and basal facts, it seems to me that the court may properly refuse to allow it to be filed."

Motion to strike out was sustained.

The rule is well setttled that matter which constitutes a new bill, or matter inconsistent with, or repugnant to, the substantial allegations of the original bill, cannot be introduced by amendment.

Ogden v. *Moore*, 95 Mich., 290.

1 Daul. Ch. Pl. and Pr., 5th Ed., 402.

Cary v. *Smith*, 11 Ga., 539.

Hill v. *Harrimann*, 95 Tenn., 300.

The amendments allowed, by the permission of the Circuit Judge to file the amended and supplemental bill, April 6, 1896, do not come within the rule as laid down by this and other courts.

In the original bill (p. 5), the reason for withdrawing the competition between Sheild and Hyer for the franchise of a street railway on Broad street, and connecting streets in the city of Richmond, which competition had been distinctly stated at p. 3, was given in these words (p. 5), as the advice of the banker of the petitioner:

"The said Stewart then advised your orator, that rivalry between the Conduit Company and your orator and his associates on the one hand, and the Traction people and the said P. B. Sheild and his associates on the other hand, and antagonism of this character, would probably result in the defeat of both their schemes, or the passage of the franchise in favor of one of the two competitors, loaded with such onerous and exacting conditions that no capitalist could be induced to put money in the enterprise; and he therefore urged your orator to shake hands with said Sheild, to unite forces with him upon one of the two ordinances—the Conduit ordinance or the Traction ordinance, and thus to secure and share the fruits of victory, instead of the disappointment and bitterness of defeat. Mr. Sheild and your orator, realizing the wisdom of this counsel, were then and there introduced by Mr. Stewart, and, after some conference, parted to meet later at your orator's hotel, having arrived at a general agreement, that the promoters of the Conduit scheme, represented by your orator, and the promoters of the Traction scheme, represented by the said Sheild, co-operate and share equally in the profits of the enterprise."

This plainly and clearly states the fact that it was to prevent the city of Richmond from taking advantage of the said competition.

The contract of August 9, 1895 (p. 6), binds the parties

and their associates, "mutually to co-operate one with the other in securing a franchise for said Railway," on "the application and franchise to be presented by the Richmond Traction Company," and that they were to decide between themselves "the policy we (they) will use in procuring the same." The petitioner, Hyer (at p. 8), states what he did in compliance with this part of the agreement. He says that he endorsed on a copy of the proposed ordinance, "a request or direction to his friends in Richmond, to give it their hearty support," and that one of these whose name he suggested to be inserted in the ordinance, "was at the time in Richmond, and was up to that moment, at work upon his Conduit scheme, but who, with your orator's entire working force, went over at once to the Traction side, openly and heartily, though some of them even then thought, as all now see, that this change of front was a mistake." And on p. 9, it is stated that the petitioner's friends and associates in Richmond, "continued in good faith to work with the Traction people, and for the passage of their ordinance, some of them actually up to the very day the Board of Aldermen finally concurred in the ordinance as passed by the lower house." This working force is described in the original bill as very effective. At p. 7, it is said they, "had the Street Committee, they had the ear of the Council." At p. 4, in describing the condition of affairs as between him and Sheild, when the petitioner went to New York to perfect his arrangements with Stewart the banker, he says he "regarded himself and associates of the Richmond Conduit R. W. Company, as having altogether the inside track in the premises," and that they "appeared to be, indeed were, masters of the situation." These expressions plainly mean that the working force of the petitioner had acquired such personal influence over the members of the City Council as to have that Council under their control, and so thoroughly under their control, as to be able to get the Council to pass the Traction ordinance instead of the Conduit ordinance, which they had first gotten them to approve, and that such influence was exerted to that end. Such personal influence exerted over

members of the Council, is unlawful, as will be demonstrated by authorities hereafter to be cited. The original bill therefore sets forth a withdrawal of competition for this street railway franchise, made expressly to prevent the city of Richmond from taking advantage of that competition to demand terms deemed advantageous to itself, and the use of a lobbying force to obtain the passage of the sole ordinance agreed upon, to be offered to the city. The petitioner therefore, in his original bill, relied on a corrupt contract to withdraw competition for a public franchise, and on the use of corrupt methods for obtaining the passage of the ordinance, which methods he asserts, were a fulfilment of the contract under which he claims.

The omission of these statements in the amended bill, was an effort to so change the grounds on which the petitioner relied for relief, as to make a new case. The attempted change was intended to be as radical as that produced in the healing of a leper. The amendments eliminated all statements of competition and rivalry; all reference to the grounds on which the parties determined to withdraw competition, and "share the fruits of victory," and all allegations touching a working force operating on the City Council. So that instead of the immoral agreement, and immoral method of executing it, set forth in the original bill, as grounds for recovery, the petitioner undertook to make a new case, entirely unlike, and contradictory of that set forth in his original bill, and to substitute a clean contract in the stead of a foul one. The excuse for seeking these amendments is found at p. 73, in the petition to amend, and at p. 89 in the amended bill. It is in these words:

"And your orator here takes occasion to state that he applied for and obtained leave of court, to amend this, his original bill, by emphasizing the openness, publicity, and fairness with which said contract was carried into effect before the City Council and its Committees; not because he considered his said bill fairly construed, as being defective in this regard

—but because it contained some loose and careless expressions which might be attempted to be twisted into an admission that something other than proper and legal influences, and the utmost candor and publicity was intended or practiced in the making and carrying out of the said contract of August 9, 1895."

This is a lame excuse, and one we would be tempted to pronounce insincere, were it not that the enthusiasm of the learned counsel for the petitioner is such that they are ready to believe anything to be true which seems to be to the advantage of their client. Certain it is that the excuse is not equal to the occasion. If the object of the learned counsel was simply to "emphasize the openness, publicity and fairness with which the said contract was carried into effect before the City Council and its committees," as is alleged, and no other object is alleged, why were the statements as to the previous rivalry between the parties and the reasons which influenced them to enter into the contract, omitted? And if it be true that learned counsel did not consider the original bill "fairly construed, as being defective in this regard," as is also stated, what was the need of amendments in regard to the conduct of the petitioner in carrying the contract into effect? Could not the counsel trust the learned Judiciary to make a fair construction of his original bill? But it is added that the original bill "contained some loose and careless expressions, which might be attempted to be twisted into an admission that something other than proper and legal influences, and the utmost candor and publicity was intended or practiced in making and carrying out of the said contract of August 9, 1895." Now no one of the statements of the original bill, omitted in the amended bill, can properly be characterised as *loose* or *careless*. They are, indeed, careful and distinct statements of *loose* morality in making and carrying out the said contract. But we may well challenge the learned counsel to point out *looseness* or *carelessness* in the language. Certainly the ground urged by Stewart, on which the competition was withdrawn, and the use of the

petitioner's *working force, which had the ear of the Council*, in obtaining the passage of the Traction ordinance, are stated with remarkable clearness, so that no two meanings could be attached to them. Nor was there any carelessness in framing the original bill. The learned counsel were employed by Hyer as early as 3d September, 1895 (see page 14), and did not file the bill till October 30, 1895. The bill was twice amended, once in a few words, and again by supplement, without any discovery by learned counsel of any looseness or carelessness in the language under discussion, and it was only afterwards, on the 6th April, 1896, after the demurrer had been developed by assigning the causes, that such was claimed to exist. Three times before the language had been relied on as perfectly proper and distinct. The attention of the Court is also called to the fact that neither in the petition to amend (page 66, &c.) nor in any of the pleadings, is it pretended that the statements stricken out by amendment from the original bill were found to be *untrue* or *mistakes of fact*. These troublesome statements are therefore admitted to be true, and because true they are troublesome since their bearing has been discovered.

Presumption of Legality.

The learned counsel might have saved themselves the labor of proving by many cases that the presumption of law is in favor of the legality of contracts. This canon of construction is familiar to every tyro in the profession. But another rule of law cannot be disputed successfully, even by indirection, as seems to be attempted, and that is, that if it clearly appears that the contract sought to be enforced is illegal, "either because its consideration is fraudulent, against morality, or against the principles of sound policy, or in contravention of the provisions of some statute" (Beach on Contracts, §1415, *Gibbs* v. *Baltimore Gas Co.*, 130 U. S., 396, Ch. Justice Shaw in *Fuller* v. *Dame*, 18 Pick. (Mass.) 472), the presumption of legality is overcome, and the contract cannot be enforced by the courts. In other words, if the contract falls within the prohibited class, no presumption as to its validity

exists. *And again*, in construing contracts, the intention of the parties should be sought, and this may be searched for, not only in the language of the contract, but in that language interpreted in the light of the surrounding circumstances. As has been well expressed in *Guaranty, &c., Association* v. *Raton*, 6 Ind. App., 83, 87, the Court should consider "the situation and relation of the contracting parties, the objects to be accomplished, and the motives they had in dealing with each other." See also *Houlton* v. *Nichol*, 33 L. R. A., 166, cited on pages 52 and 53 of petitioner's brief.

It is contended for the demurrants that the contract sued on is plainly

Against Public Policy.

And this on two grounds, its stipulation to withdraw competition already existing for the grant of a franchise in which the public were interested, and the unlawful manner in which the parties were to obtain and enjoy said franchise. And first the

Withdrawal of Competition.

Greenhood, in his work on Public Policy, page 178, Rule clxxii, correctly states the rule thus:

"*Any agreement which in its object or nature is calculated to diminish competition for the obtainment of a public, or quasi public contract, to the detriment of the public, or those awarding the contract, is void.*" And he cites many cases in support of the text. This statement of the law has been plainly approved by this court in the case of *Gibbs* v. *Baltimore Gas Co.*, 130 U. S. 396, in which the Chief Justice, in delivering the opinion of the court, said:

"In the instance of business of such character that it presumably cannot be restrained to any extent whatever without prejudice to the public interest, courts decline to enforce or sustain contracts imposing such restraint however partial, because in contravention of public policy."

"All (promises) detrimental to the public order and public good, in such manner and degree as the courts have defined:

* * are void" (pp. 409–10). Among the cases cited by the Chief Justice in support of this statement, is *Woodruff* vs. *Berry*, 40 Ark. 251. In that case, at p. 261, the court said: "When either the intention, the effect or the necessary tendency of the combination is to stifle or limit competition, it is contrary to public policy and will be disapproved."

In other States the same doctrine has prevailed, and has been, if any thing, more plainly stated.

In *Gibbs* vs. *Smith*, 115 Mass. 292, where it was sought to enforce a contract for $500 for not bidding for the labor of the inmates of a house of correction, the court held the contract void, and said: "Nor is it any answer to show that no injury has been done to the party selling. That which renders the contract illegal is not the injury the parties have actually occasioned, but the purpose which they must have contemplated when it was made; its validity is tested, not by its results, but by its objects as shown by its terms." The same language is used in *Rice* vs. *Wood*, 113 Mass. 133. And in *Atchison* vs. *Mallon*, 43 N. Y. 147, where there was competition for the collection of town taxes, and the plaintiff and defendants agreed to bid severally, and to divide equally the profits if either obtained the contract, the agreement was held void as against public policy, and the court said: "The true inquiry is, is it the natural tendency of such an agreement to injuriously influence the public interest? The rule is that agreements which in their necessary operation upon the action of the parties to them, tend to restrain their natural rivalry and competition, and thus to result in the disadvantage of the public or third parties, are against the principles of sound public policy and are void."

And in *Central Ohio Salt Co.* v. *Guthrie*, 35 Ohio State, 666, the Court said:

"Courts will not stop to enquire as to the degree of injury inflicted upon the public; it is enough to know that the inevitable tendency of such contracts is injurious to the public."

In *Firemen's, Etc., Associa.* v. *Berghaus*, 13 La. Ann., 209,

the principle is stated to be, that "when a contract belongs to a class which is reprobated by public policy, it will be declared void, although in that particular instance no injury to the public may have resulted." Approved in *Texas & Pacific Ry. Co.*, v. *S. P. Ry. Co.*, 41 La. Ann., 970.

The same principle is maintained in *People* v. *Sheldon*, 139 N. Y., 251. Andrews, C. J., said:

"If agreements and combinations to prevent competition in price, are or *may* be hurtful to trade, the only sure remedy is to prohibit all agreements of that character. If the validity of such an agreement was made to depend upon actual proof of public prejudice or injury, it would be very difficult in any case, to establish the invalidity, although the moral evidence might be very convincing."

So in *Hannah* v. *Fife*, 27 Mich., 180, it was said: "It is this tendency, rather than the fact of actual fraud in the particular transaction, which is generally recognized as rendering contracts void as against public policy." And in conclusion the Court said: "The thirst for public plunder, always strong, has of late been stimulated to unwonted eagerness, and has seized like an epidemic upon all classes of the community. If public officers and the courts can not check its progress by any obstacle of their own creation, they can, at least, refuse to aid in spreading the contagion, and may do something to discourage and check its course, by refusing to afford it such facilities as it may be within their power to withhold."

And in *Swan* v. *Chorpenning*, 20 Cal., 182, where there was an agreement respecting a government contract, in delivering the opinion of the Court, Cope J., Field, C. J., concurring, said:

"It is contended, that the particular circumstances of this case relieve the transaction of its illegal character; but we take a different view of these circumstances. The purpose for which the bid was to be withdrawn, we do not consider material, nor do we regard as important the fact that the withdrawal resulted in no actual injury to the Government. * * The

agreement to withdraw was undoubtedly injurious in its tendency, and the policy contravened by it is only to be satisfied by declaring its invalidity."

In *Smith* v. *Applegate*, 3 Zab. (N. J.), 352, Green, C. J., said:

"It may be that the transaction, as between the parties, was fair, and that no fraud was meditated or actually committed. It may be that the makers of the note have received a full equivalent for the price which they assumed to pay. It may be that the owner of the land would receive, by the payment of the note, no more than a fair equivalent for the land taken for the road. But courts cannot lend their aid nor the sanction of the law, to enforce a contract in contravention of sound policy, and subversive of the interests of the public."

In *Wicker* v. *Hoppock*, 6 Wal., U. S. 98, cited in the brief of the appellant, the contract was for bidding at a judicial sale, and as was said by Mr. Justice Swayne in delivering the opinion, the contract was that one party *should bid*. There was no stipulation that the other should not, nor was there anything which forbad him to bid, and nothing which had any tendency to prevent bidding by others. The object of the contract obviously was to secure, not to prevent bidding.

In delivering the opinion of the court the Justice said:

"*The validity of such an arrangement depends upon the intention by which the parties are animated, and the object sought to be accomplished.* If the object be fair—if there is no indirection—no purpose to prevent the competition of bidders, and such is not the necessary effect of the arrangement in a way contrary to public policy, the agreement is unobjectionable and will be sustained."

It will be seen that the actual effect upon the public interest in any case of a withdrawal of competition is not the controlling fact in the condemnation of the contract to withdraw, but the natural tendency of such an agreement to injuriously affect the public interests is the matter to be considered.

In the case at bar, not only does the contract sued on have the natural tendency to injuriously affect the public interest, but the parties openly avowed such to be their intention, and further, the actual result of their agreement was to injuriously affect the public interests. That there was competion between the parties for the franchise in question is plainly stated in the record, even in the last amended bill. At page 84 the petitioner states the history of his application for the said franchise on behalf of himself and his associates under the corporate name of the "Richmond Conduit Company." On page 85 he states that "certain parties were seeking to procure the grant of this franchise to them under the style of the 'Richmond Traction Company,'" and "that one P. B. Sheild, an attorney at law, appeared to be at the head of the movement, or at least in charge of it before the City Council and its committees."

The petitioner then goes on to state (pages 85–6) how he was introduced to Sheild at the office of Stewart & Co., in New York, at the earnest solicitation of Sheild, and how they agreed to end their competition by the withdrawal of the application for the Conduit ordinance from before the Richmond City Council, uniting on the Traction ordinance, and sharing equally whatever might be realized from the enterprise. The matter is plainly stated also in the card of the petitioner in the *State* newspaper, 26th August, 1895, which appeared in the shape of an interview. In this (page 93) he states he held the contract in question, and in answer to the question, "*What is the* CONSIDERATION *of this contract you hold?*" he replies: "I WAS TO CAUSE THE WITHDRAWAL OF THE RICHMOND CONDUIT COMPANY'S APPLICATION FOR FRANCHISE IN FAVOR OF THE TRACTION COMPANY, *which was done in due form before the Street Committee* There were a few other minor details, all of which have been complied with." The contract itself also shows a withdrawal of competition between the parties and their uniting on one of the ordinances theretofore proposed. Now as a competition for this valuable franchise already existed, in rival proposals for it by different parties, thus giving the city the opportunity

of getting the best terms for its grant, the withdrawal of that competition left the city with but one bidder, and therefore deprived her of the vantage ground of putting up the franchise to the highest of two bidders. That the exercise of the franchise would be beneficial to the city is apparent, but she was entitled to get the best price for it from those who wished to acquire it. It cannot be denied, therefore, that the natural tendency of the withdrawal of competition between the parties seeking the franchise, was to injuriously affect the public interest. And if so, under the authorities cited, the contract was against public policy and void.

But other elements make this a still stronger case against the parties. It was their proposed intention to benefit themselves at the expense of the city. In the last amended bill, at p. 86, an account is given of how the parties came to withdraw their competition, and unite on one of the ordinances proposed. It is said that the banker "Stewart then advised your orator to shake hands with Sheild, and to unite with him upon one of the two ordinances—the Conduit or the Traction ordinance. Mr. Sheild and your orator realizing the wisdom of this counsel, were then and there introduced" and made this contract. Although the attempt is here made to smother the grounds of Stewart's advice, it is plain that the withdrawal of competition and union on one of the proposed schemes was intended for the benefit of Hyer and Sheild and their associates, for the parties realized "the wisdom of the counsel," of course its wisdom in reference to themselves, or the advantage it would bring to them in dealing with the city. In the original bill the grounds of Stewart's advice, as stated by himself, are given (p. 5) and have been quoted. It is said that upon this wise advice the contract was made. Here it is plainly stated that the rivalry and competition were so warm, that they might result in the parties accepting such hard terms from the city as to defeat the enterprise in the hands of the winner; and by withdrawing competition and uniting they would secure the *fruits of victory* over the city. It was, there-

fore, with the intention to benefit themselves at the cost of the city, that the competition was withdrawn and the union of the parties on the Traction ordinance was agreed on.

That this action of the parties was actually injurious to the interests of the city of Richmond is also shown in both bills. The word *conduit* in the name of the petitioner's ordinance indicates that the motive power proposed to be used was *electric*, but the wires were to be *under ground*. Booth on Street Railways, § 66, defines the conduit system as an "electric propulsion underground." And he defines the cable system as purely "mechanical," and not included in the "electric class." We see by the contract sued on that the application to be presented to the City Council was to be that of the Traction Company "for the building of an overhead trolley railway or cable system." This means either that the ordinance was to be for an overhead trolley railway or for a cable system, one or the other only asked for, or that it was to give the city the choice between an overhead trolley and a cable system. Under either interpretation the proposal of the Richmond Traction was for a very different system from that which was proposed by the Conduit Company. That an underground electric propulsion was safer for the public than an overhead trolley system is self-evident; and that a well perfected conduit system, as has now been attained, is preferable to a mechanical cable system, is also apparent from the preference given to electricity as a motive power in the construction of street railways. The City Council had indicated a preference for the *conduit* system by passing the ordinance for it, which only waited for the amendments desired by the petitioner. When the petitioner withdrew his application for a conduit franchise, he deprived the city of those very advantages of which he had convinced the City Council, as his only competitor proposed a different system which he had shown to be inferior.

But it is insisted that the city could not have been injured by this, because it is alleged that, by the 5th paragraph of the Traction ordinance (p. 21), the city reserved absolute choice

and control of the motive power to be used by that company. That paragraph is in these words:

Fifth. "The said company may operate its cars along said routes by electricity or such other motive power, except steam, as may be hereafter *authorized* by the City Council, but such permission to use electricity shall be subject to each and every restriction and condition heretofore imposed by the City Council upon any one or more of the street railway companies using electricity as a motive power in this city, except as herein otherwise provided; and for the failure of the said company to perform any one or more of said restrictions or conditions, it shall be liable to a fine of not less than ten nor more than one hundred dollars, each day's failure to be a separate offence. The city hereby expressly reserves the right to revoke at any time the right or permission to use electricity as a motive power, or to put any further conditions, restrictions and regulations as to the use of electricity."

In interpreting this paragraph, it is necessary to consider the circumstances attending the passage of the ordinance. (*Nash* v. *Towne*, 5 Wal., 699.) In the last amended bill (p. 90), it is stated that, "The existence and substance of the contract of August 9, being generally and fully known by the Council of Richmond, and the public generally, and in no way concealed or suppressed." (The word "city," is improperly printed before the word "August.") By that contract, the Traction Company was to use the overhead trolley system, if allowed to use electricity. This being known to the Council, when they by the ordinance, permitted the Company to use electricity, and forbade the use of any other motive power, without a subsequent special authority from the Council, it must have been understood, that the trolley system was to be used. Again, when this permission was put under the restrictions and conditions theretofore imposed upon the other city railway companies of the city using electricity as a motive power, it indicated that those companies used electricity by the

same system, and this explains paragraph 7 (p. 21), whereby it is provided that there may be an interchange of tracks between the Traction Company and other companies using electricity. When therefore, it is further provided in paragraph 5, that the city may "put further conditions, restrictions, and regulations as to the use of electricity," the reference is to the use already granted, which was that of the "overhead trolley system." That is the subject matter of the paragraph, and its language must be interpreted with that fact in mind, and so as to make the language refer to the use of electricity intended to be granted. It is the use of the trolley system previously granted, that is made liable to further conditions, restrictions, and regulations.

If however, the language can properly be interpreted to mean that the city reserved the right to require the use of the Conduit system by the Traction Company, then attention is called to the fact that no penalty is attached to their refusal to obey, and they might therefore prefer to give up their franchise, rather than change their system. And the same may be said of the power reserved to revoke the right to use electricity as a motive power. So that the city would have no right to *force* the company to use any other than the overhead trolley system, although it might require it. And, therefore, the statement in the brief (p. 75), that "the Council reserved absolute choice and control as to the motive power and character of the road," is incorrect. Under the ordinance, the city could not force the Traction Company to change its system, and therefore does not control the company in any sense that prevents the withdrawal of the previous competition from affecting it injuriously.

But the withdrawal of competition injured the city in other matters of interest to her. By the Act of March 20, 1860, authorising the city to pass the ordinance (see appendix to this brief), the Council was authorised to impose "such provisions, restrictions, and limitations," as it deemed best. In exercising this power, the city was entitled to the best terms it could get, as the result of the competition. In paragraphs 9

and 10 (pp. 23–24) we find that the city requires of the company a percentage on gross receipts 'till 1900, and a sum to be fixed afterwards, that the rate of fares to the public, to school children, and to laborers, is fixed; and other regulations will be found in the ordinance in the interest of the city. All these had to be fixed with a sole applicant for the franchise. Had the competition continued, the city would have been able to get better terms for herself and her citizens in each of these items. Or, she might have sold the franchise for a large sum in gross. The withdrawal of competition was therefore directly injurious to the interests of the city, and was so intended to be by the parties, who had become aware of the fact that the city intended to use that competition to her own advantage, and for that reason withdrew their competition.

It is attempted to make the impression that the withdrawal of competition and combination of the parties was to unite the services of an engineer (Hyer), of a lawyer (Sheild), and of a banker (Stewart) in the enterprise. The answer to this is that no such motive is assigned in any of the bills. On the contrary, the petitioner represents himself as unwilling to treat with Sheild until Stewart pointed out the injury Sheild might do him by the competition.

It was also argued for the appellant heretofore, and may be again, that the agreement sued on was only an arrangement whereby parties desiring to undertake an important enterprise, and having difficulty in obtaining capital, united, and were thus enabled to undertake an enterprise which otherwise would have been abandoned, to the detriment of the city. The allegations of all the bills, however, negative this position. It is alleged (pages 2, 4, 84–5) that the appellant had obtained cooperation or assurance of adequate capital before he made his first application for the franchise: that on 9th of August, 1895, he was in New York perfecting his arrangements for prompt and vigorous action under his Conduit ordinance, and that his conference with Sheild was only at the earnest pleading of Sheild (pages 85–6), and that his contract with him was a mistake (p. 8); so that the appellant shows that he and

his associates were amply able to carry out their scheme without aid from Sheild and his associates. That Sheild needed no aid from the petitioner or his banker in obtaining capital is also shown in the last amended bill, at page 102, where it is stated that the Maryland Trust Company and John L. Williams & Sons negotiated the bonds of the Company used in constructing its works.

Nor does the alleged open avowal of the contract before the Council cleanse it of its immorality. Had nothing been said by the parties as to their agreement, the fact that the Conduit ordinance was withdrawn, that one at least of the persons who had asked for it appeared in the Traction ordinance—W. F. Jenkins (pages 96–7)—and that the persons who had urged the Conduit were now urging the Traction ordinance, would have informed the Council that the parties had agreed among themselves to withdraw competition and share in the remaining ordinance. It is not possible to conceive that, where two or more persons first compete for anything, and the competition is afterwards withdrawn, the person or corporation having the disposal of the thing competed for, does not become aware of the withdrawal. And when the competitors at once become allies in the effort to obtain for themselves jointly what they previously competed for separately, they thereby give conclusive evidence of a bargain to share in the thing sought. What more could an open avowal of the contract do to inform everyone interested of what had happened? We may well inquire also how it was possible that the City Council could be in a better condition to take care of its interests after the alleged avowal, than it would have been had the Conduit ordinance been withdrawn and the Traction substituted, without a word of explanation. It has been held that the concealment by a lobbyist of the interest he represents is a fraud on the legislature, but no authority makes the concealment, even in such case, a necessary element of the illegal conduct. Even in the case of lobbying, when open avowal would put the Legislators more on their guard, this Court has regarded publicity of action as but an aggravation of the immorality. In *Trist* vs. *Child*, at page

451, in denouncing contracts for lobby services before Congress, the Court said:

"If the instances were numerous, open and tolerated, they would be regarded as measuring the decay of public morals and the degeneracy of the times. No prophet's spirit would be needed to foretell the consequences near at hand. The same thing in lesser legislation, if not so prolific of alarming evils, is not less vicious in itself, nor less to be condemned. The vital principle of both is the same."

In the great case of *Edgerton* vs. *Brownlow*, 4 H. L. Cases, 1 to 225, and in *Kingston* vs. *Pierpont*, 1 Simon, 5, therein commented on, the cases involved the construction of wills that had been recorded, wherein sums were left to employ agents to obtain peerages for devisees. Here everything, including the work of the agents, was open, and yet the House of Lords condemned the provisions as corrupting in their tendency, denouncing them because of their openness, as unblushing and audacious: and so here, the openness of the contract sued on only demonstrates the shamelessness of the parties, without in the least purging their immorality.

In addition to the authorities already cited, the following may be added, as cases in which the contracts were condemned:

Gulick v. *Ward*, 5 Halstead (N. J.), 87, which was a contract to abstain from bidding for a mail contract.

Ray v. *Mackin*, 100 Ill., 246, where B having bid for paving a street, C proposed to bid against him, and B then agreed to withdraw his bid and permit C to file a bid, which B was to aid in getting accepted, and to receive a certain sum out of the profits.

Pingrey v. *Washburn*, 1 Aiken (Vt.), 264, where it was sought to enforce an agreement on the part of a corporation, to grant to individuals certain privileges, in consideration they would withdraw their opposition to the passage of a legislative Act touching the interest of the corporation.

Hunter v. *Nolf*, 71 Pa. St., 282, in which there was an

agreement for the withdrawal from competition for an assessor's office.

Gray v. *Hook*, 4 N. Y., 449, also a case of withdrawal of competition for office.

Kine v. *Turner*, 27 Oregon, 356, in which the agreement provided for not bidding at a sale of public land.

Chippewa Valley etc., R. Co. v. *R. R. Co.*, 75 Wis., 224, where there was an agreement for not bidding for land grant, and promise of aid to another to secure it.

Atlas Nat. Bk. v. *Holm*, 71 Fed. Rep., 489 (C. C. A., 7th Cir.), which holds that a note given in part in consideration of an agreement to refrain from bidding at a public sale of goods by a statutory assignee, was invalid, except in the hands of an innocent purchaser.

Sharp v. *Wright*, 35 Barb, 236, an agreement between different sets of bidders for a public contract, by which one agreed, in consideration of a sum of money, to withdraw his bid, and assist the latter to obtain the contract. Held to be void as against public policy.

In *Cocks* v. *Izard*, 7 Wal., 559, preventing competition at a judicial sale was declared illegal, and the court declared that "the law will not tolerate any influences likely to prevent competition at a judicial sale."

See also:

Gibbs v. *Consol. Gas Co.*, 130 U. S.
Woodruff v. *Berry*, 40 Ark., 251.
National Bank of Metropolis v. *Sprague*, 20 N. J. Eq., 159.
Doolin v. *Ward*, 6 Johns (N. Y.), 194.
Wilbur v. *Howe*, 8 Johns (N. Y.), 346.
Stanton v. *Allen*, 5 Denio (N. Y.), 434.

The cases cited by the learned counsel for complainant, in support of their contention that the contract here sued upon is not void as tending to withdraw competition, are simply cases where the sale of the property or the letting of the contract was benefitted by the joint action of parties interested, as where the property could not be properly divided or separated so as

to bring the sale within the means of individual bidders, or where the combination or association of the parties was to enable them to become bidders and not to prevent competition. The distinction is well defined by the courts between that class of contracts and such contracts as the one at bar having as its very foundation and chief motive and its plain tendency, the suppression of rivalry and competition between the parties previously bidders for a public franchise. *Men may lawfully combine to purchase what individually they cannot or would not buy, or to acquire and exercise a public franchise under similar circumstances. Such combinations everywhere appear in the conduct of public improvements. But where two or more persons or sets of persons* ONCE COMPETE *for a public franchise, and* AFTERWARDS WITHDRAW *competition in order to obtain the franchise on better terms for themselves,* IT IS ILLEGAL. *This distinction runs through the following cases, cited for the petitioner:*

The case of *Kearney* v. *Taylor*, 15 How., 514, quoted at length in the brief for the appellant, was a suit to set aside a deed to property which had been purchased by an association created for the purpose, and one of the grounds alleged for the equitable interference was that such an association was illegal. The facts of the case, as they appear in the opinion of Nelson, J., were that a large tract of land was offered for sale, and presented a favorable opportunity for the building of a town. "This enterprise, however, required a considerable outlay of capital, in the construction of docks or wharves and in the erection of a warehouse and other edifices for the accommodation of the public, beyond the means of any individual in that retired locality, or of any one who might be inclined to take an interest in it. To overcome this difficulty, those interested in the sale and who were desirous the property should bring the highest price, exerted themselves to form an association or company, composed of persons in the neighborhood who had a common and general interest in the object in view, the building up of this little port and town, for the purpose of bidding in the property and engaging in the enterprise. * There was also another circumstance that operated in the formation of

this company. A little port and town had sprung up at a neighboring point on the bay, called Middleton Point, and it was given out that the people of this town had associated to bid off the site of this new one at the sale, in contemplation and with a view to prevent a rival place of business in the vicinity. Under these circumstances, the company in question was formed, and bid at the sale in competition with the Middleton Point association; and being the highest bidders, the property was struck off to them."

Phippen v. *Stickney*, 3 Metcalf (Mass.), 64, also clearly recognizes this distinction, and is not in conflict with the decision of *Gibbs* v. *Smith*, 115 Mass., 592, and of *Rice* v. *Wood*, 113 Mass., 133, to which we have called attention.

So with *Oakes* v. *C. W. Co.*, 143 N. Y. 430.

O'Brien, J., in delivering the opinion of the court, expressly said: "There was no purpose to suppress competition or bidding at any public sale, or letting of a contract for public purposes or in restraint of trade, or to influence the action of public officials." The whole court, however, did not think the contract in fact one for honest co-operation, for Gray and Finch dissented from opinion of the court.

The opinion of Gilchrist, J., in *Bellows* v. *Russell*, 20 N. H. 427, is in accord with our view of the law. He cites with approval *Doolin* v. *Ward*, 6 Johns. (N. Y.) 194; *Wilbur* v. *Howe*, 8 Johns. (N. Y.) 444, and the doctrine laid down by Mr. Justice Story, "that agreements whereby parties engage not to bid against each other at a public auction, especially where such auctions are directed or required by law, as in sales of chattels or other property by execution, are held void: for they are unconscientious and against public policy, and have a tendency injuriously to affect the character and value of sales at public auction and mislead public confidence." Following this citation, the learned judge continues: "It is, therefore, a well settled doctrine, and is undoubtedly a reasonable one, that holds to be illegal and fraudulent a combination of parties for the express purpose of preventing competition among bidders at an auction, with a view to take advantage of such a state of

things for their own benefit. It is, however, a different thing entirely to hold that when several parties desire, for any reasonable and just purpose, to become the joint purchasers of property exposed at auction, or to become interested together in a contract so exposed for the competition of bidders, they may not lawfully employ one of their number to act in behalf of the whole, and to bid off for their benefit the property, job or contract so offered." In this case the question of the legality of the contract was submitted to the court. It was decided that "the intent, and other circumstances attending the consent of the parties to the arrangement disclosed in this case, must settle its legal character."

Marsh v. *Russell*, 66 N. Y. 288, was a case of partnership for the conduct of a lawful business, and the agreement was not an attempt to prevent competition.

In *Jenkins* v. *Frink*, 30 Cal., 586, the contract sought to be enforced, expressly stated the honest purpose of the parties, each being desirous of purchasing a part of the property offered for sale, and not the entire tract. The Court said: "there is no principle of right-reason upon which it can be held that the agreement now in question, was calculated to keep bidders away from the auction, or to prevent free and intelligent competition among those who attended it: while it is apparent, on the other hand, that one bidder at least, attended the sale in consequence of the agreement, and who for aught we know to the contrary, would have staid away if the agreement had not been made."

The case of *Lorillard* v. *Clyde*, 86 N.Y. 384, so confidently cited for the appellant, was one of the union of certain steamboat owners to obtain a charter for their incorporation. They agreed on the details of the business of the proposed corporation, and the question discussed in the case was whether such previous agreement as to details was binding. There was no competition between the parties for the franchise in that case.

Lobbying.

By a strange lapse of memory, the learned counsel for the appellant, state that the foregoing class of cases on withdrawal of competition, was the only one to which any earnest effort was made by the defendants in the lower courts to assimilate the case at bar. They must have lost our printed briefs, as well as forgotten the oral arguments. We have contended in the lower courts, as we do here, that this case comes under the principle stated on abundant authority, by Greenhood, on Public Policy, Rule C. C. C., p 362, as follows: "*Any promise to pay a fee contingent, on the passage of a bill, is void, because a contingent fee is a direct and strong incentive to the exertion of not merely personal but sinister influences upon the Legislature, and therefore, public policy forbids the legal recognition of any such contracts.*"

Let us first examine the authorities, and then see if the allegations of the bills bring this case under the ban of the rule.

In the leading case of *Marshall* v. *B. & O. R. R.*, 16 How., 325–335, arising on a contract for contingent fee for lobbying, the doctrine is stated thus by the court: "Bribes in the shape of high contingent compensation, must necessarily lead to the use of improper means, and the exercise of undue influence." And the court declare "that all contracts for contingent compensation for obtaining legislation, or to use personal, or any secret or sinister influences on legislators, are void, by the policy of the law." And "that what in the technical vocabulary of politicians is termed *log rolling*, is a misdemeanor at common law, punishable by indictment." Log rolling is defined by Worcester to be "a cant term for a system of manœuvering or mutual co-operation in legislation, &c., to carry favorite measures." This statement of the law is sustained in subsequent cases in the Supreme Court.

Tool Co. v. *Norris*, 2 Wal., 45.
Trist v. *Child*, 21 Wal., 441.
Meguire v. *Corwine*, 101 U. S., 108.
Oscanyan v. *Arms Co.*, 103 U. S., 261, 269, &c.

Woodstock Iron Co. v. *R. & D. Extension Co.*, 129 U. S., 643, 662.

McMullan v. *Hoffman*, 69 Fed. Rep., 509.

And is recognized in the late case of *Gibbs* v. *Baltimore Gas Co.*, 130 U. S., 396.

In *Tool Co.* v. *Norris*, the Court through Justice Field, said (pp. 54 and 56):

"The principle which determines the invalidity of the agreement in question, has been asserted * * in cases relating to agreements for compensation for obtaining legislation. These have been uniformly declared invalid, and the decisions have *not turned upon the question whether improper influences were contemplated or used, but upon the corrupting tendency of the agreements.* Legislation should be prompted solely from considerations of the public good, and the best means of advancing it. * * Agreements for compensation contingent upon success, suggest the use of sinister and corrupt means for the accomplishment of the end desired. The law meets the suggestion of evil, and strikes down the contract from its inception. * * All agreements for pecuniary consideration to control the business operations of the Government, or the regular administration of justice, or the appointment to public offices, or the ordinary course of legislation, are void as against public policy, without reference to the question, whether improper means are contemplated or used in their execution. The law looks to the general tendency of such agreements; and it closes the door to temptation, by refusing them recognition in any of the Courts of the country."

In *Trist* v. *Child*, which arose on the claim of an attorney for a contingent fee for legitimate or purely professional services in representing a claim before Congress, but, who it appeared, blended with such services, personal solicitation of the members, the Court after drawing the line between the two, said (p. 452):

percentage upon the amount appropriated, the danger of tampering in its worse form is greatly increased. It is by reason of these things, that the law is as it is upon the subject. It will not allow either party to be led into temptation when the thing to be guarded against, is so deleterious to private morals, and so injurious to public welfare. In expressing these views, we follow the lead of reason and authority."

These decisions of the Supreme Court of the United States, which are controlling in this case, have been followed in many decisions of the highest State Courts, among which may be mentioned:

Clippenger v. *Hepbaugh*, 5 Watts & S. (Pa.), 315.
Mills v. *Mills*, 40 N. Y., 543, 546.
Rose v. *Truax*, 21 Barb. (N. Y.), 361.
Harris v. *Roof*, 10 Barb. (N. Y.), 489.
Powers v. *Skinner*, 34 Vt., 274, 281.
Pingrey v. *Washburn*, 1 Aiken (Vt.), 264.
Bryan v. *Reynolds*, 5 Wis., 200.
Chippewa Valley R. Co. &c. v. *Chicago R. Co.*, 75 Wis., 224, 6 L. R. A., 601.
Hunter v. *Nolf*, 71 Pa. St., 282.
Elkhart Co. Lodge v. *Crary*, 98 Ind., 238.
Sweeney v. *McLeod*, 15 Oreg., 330.
Doane v. *Chicago City Ry.*, 160 Ill., 22.
Bermudez &c. Co. v. *Critchfield*, 62 Ill. App., 221.
Ormerod v. *Dearman*, 100 Pa. St., 561.
Spalding v. *Ewing* (1896), 149 Pa. St., 379.
Houlton v. *Dunn*, 60 Minn., 26.
Jacobs v. *Tobiason*, 65 Iowa, 245.
Wood v. *McCann*, 6 Dana (Ky.), 366.
Smith v. *Applegate*, 3 Zab. (N. J.), 352.
Powell v. *Maguire*, 43 Cal. 11.

Clippenger v. *Hepbaugh*, 5 W. & S. (Pa.) 315.
Harris v. *Roof*, 10 Barb. (N. Y.) 489.
Rose v. *Truax*, 21 Barb. (N. Y.) 361.

The case of *Clippenger* v. *Hepbaugh* was also cited with approval in *Marshall* v. *Baltimore & Ohio R. R. Co.*, 16 Howard, 314.

In that case a lawyer was to be paid $100, contingent on procuring a law to sell and invest the proceeds of certain real estate devised to a wife and children. It was proved that he was employed professionally; that he simply drew papers and appeared before committee of the Legislature. The court said, at p. 319, "no suspicion is entertained that anything out of the ordinary course took place in respect to the bill, yet it cannot escape observation that even here an inducement was not wanting to an improper or personal influence or deceptive acts to procure the success of the measure."

And although the fee was small, yet, because it was contingent, the court held that the tendency of the contract was against public policy, and therefore void.

To the same effect are the other two State cases cited by the Supreme Court.

In *Powers* v. *Skinner*, 34 Vt. 274, where it was sought to enforce a contract for compensation in obtaining from the Legislature a bank charter, after reviewing the authorities, Kellog, J., for the court, said (p. 281): "The principle of these decisions has no respect to the equities between the parties, but is controlled solely by the tendency of the contract; and it matters not that nothing improper was done or was expected to be done under it. The law will not concede to any man, however honest he may be, the privilege of making a contract which it would not recognize when made by designing and corrupt men."

In the case of *Chippewa Valley R. Co.* v. *The Chicago, etc., R. Co.*, 75 Wis. 224, 6 L. R. A. 601, the circumstances were remarkably like those in the case at bar. A contract was made by two railroad companies whereby one agreed to refrain from

any effort to obtain a grant of land from the Legislature and to aid the other company to procure it "by all reasonable and proper assistance," in consideration of a share of the grant obtained. The contract was declared to be void as against public policy. Cassoday, J., delivered the opinion of the court in an able and exhaustive review of the authorities on the subject, to which this court is respectfully referred, and which saves us from further wearying it with extracts from the cases cited by us.

The principle established by the numerous cases cited, and which might be cited, is embodied in the Code of Virginia 1887, sec. 3746, in force at the date of the contract sued on here, which was to be executed in the State of Virginia, as follows: "If any person pay or receive money or other compensations, directly or indirectly, for the purpose of securing the passage or defeat of any measure by the General Assembly, he shall be confined in jail not exceeding twelve months, and fined not exceeding five thousand dollars."

Sec. 3748 of the Virginia Code 1887 excepts persons who may be invited by, or have the permission of, regular or special committees of the General Assembly to appear before them. To claim the protection of this exception the complainant should have stated the fact of such invitation or permission, and that an appearance before a committee was the only service rendered, and in other features bring himself clear of the condemnation pronounced by the courts. For if to legitimate service be united illegitimate, or he had a contract which might tend to illegitimate service, this would destroy his right to recover for legitimate services, as was distinctly held in the case of *Trist* vs. *Child* and *Rose* v. *Truax*, *supra*, and other cases cited. Story Eq. Pl., § 255–7. *Crocket* v. *Lee*, 7 Wheat, 522.

We need hardly cite authority for the proposition that a contract to be performed in Virginia contrary to the policy of the Virginia statute, cannot be enforced in this State.

Two grounds are urged by the learned counsel for the defendant upon which they hope to take the case at bar out of the operation of the principle applicable to contracts against

public policy. One is a canon framed by the counsel themselves, never yet announced by a court or text writer, and directly in the teeth of the authorities. It is that in procuring legislation publicity eliminates the immorality, or as they expressed it in a previous brief, "open contracts for open services valid; secret contracts for secret services void." And to fit their case to this newly born canon, they amended their original and supplemental bills, and set forth that the said contract of the 9th of August, 1895, was generally and fully known by the Council of Richmond and the public in general, and was well and thoroughly known to the Committee on Streets (page 90).

The last amended bill alleges (page 84) that the appellant had already expended, in procuring the Conduit franchise, between $3,500.00 and $4,000.00 in traveling, hotel bills, counsel fees, and other expenses, and (page 83) that the half of the franchise sued for vastly exceeds $2,000.00; so that at the least the contingent fee of the appellant was to be $5,500.00 for withdrawing his Conduit ordinance and *co-operating* with Sheild in securing from the Council the franchise proposed by the Traction Company, and if he is to get the one-half of that franchise, without subscribing and paying for the stock, his contingent fee will be his said expenses and $150,000.00 face value of stock in the Traction Company. And if he has to pay for the stock, he estimates it is worth more than $2,000.00 above par. Here then is a large contingent fee to be paid the appellant and his associates for their withdrawal of competition and co-operation in securing their rival's franchise.

Under the authorities we have cited, this part of the agreement can bear no two constructions; it is plainly against public policy, being corrupting in its tendency, both because of the contingency in the fee for services to be rendered, and for the withdrawal of competition in a matter affecting the public.

The case of *Mills* v. *Mills*, 40 N. Y., 543, *supra*, is very similar to this. There certain parties agreed that a bill pending before the Legislature for the privilege of building and operating a street railway in Brooklyn should be amended, so

as to limit the grant to the parties to the agreement, and that the rights to be conferred by the law should, after its passage, be transferred to one of the parties, the other party agreeing to procure the passage of the law for his benefit. The court held the contract void on the ground of public policy, and further laid down the rule, that in such cases it is not necessary to adjudge that the parties stipulated for corrupt action, or intended that secret and improper resorts should be had.

In *Chippewa Valley, etc., R. Co.* v. *Chicago, etc., R. Co.*, 75 Wis., 224, *supra*, the contract was that one company should cease negotiation for a land grant, and should render to the other "all such reasonable and proper assistance as they should be able to give in the premises," to enable the other company to obtain the grant. And as a consideration, the company so rendering assistance was to share in the grant after it was obtained. Surely the words "co-operate in securing a franchise," used in the said contract of the 9th of August, 1895, are much broader and more liable to abuse in operations under them than the above, and are not restricted by the terms "reasonable and proper assistance." Yet in that case, when it was urged that a presumption existed in favor of its legality, and among other grounds that the assistance might have been publicly given and in legitimate ways, the court held that the contract was in itself against public policy, and for that reason must be held void, although it might have been and actually was complied with by lawful means.

Amongst other authorities cited by the learned Judge is *Fuller* vs. *Dame*, 18 Pick. (Mass.), 472, also cited in *Marshall* v. *B. & O. R. Co.*, 16 How., 336, in which Shaw, C. J., for the court, said: "It was strongly pressed by the counsel for the plaintiffs that when a contract is made in general terms, broad enough to include things lawful and things unlawful, it shall be presumed that they intended only those which were lawful. * * * The law goes further than merely to annul contracts where the obvious and avowed purpose is to do or cause the doing of unlawful acts. It avoids contracts and promises made with a view to place one under wrong influences—those which

offer him a temptation to do that which may injuriously affect the interests of third parties." See also *Weed* v. *Black*, 2 Mac. Arthur, 268, 275.

Against the American doctrine of public policy so unanimously announced, the learned counsel rely upon certain English decisions, and mainly upon the authority of Lord Cottenham. In the subsequent cases of *Earl of Shrewsbury* v. *North Staffordshire Railway Co.*, L. R., 1 Eq. Cas., page 616, and *Edgerton* v. *Earl Brownlow*, 4 H. of L. Cases, 1, the cases relied on by the appellant, if, indeed, authority for his position, have been overruled, and the English doctrine as to public policy now coincides with the American. In the last mentioned case, the court is referred to the opinions of Lord Lynhurst, page 163; of Lord Brougham, pages 174, 178, 179; Lord Truro, pages 201, 202; and of Lord St. Leonards, pages 233–234. The sum of all the cases is that such contracts as the one sued on here are unlawful in themselves, because of their tendency to injuriously affect legislation, and their temptation to employ unlawful means to attain their end. As was said in *Trist* v. *Child:* "The law meets the suggestion of evil and strikes down the contract from its inception."

It is plain that the agreement as to the mode and manner in which the franchise was to be obtained from the City Council was such as has been condemned by the courts time and again. The said contract provides that the parties were to decide thereafter upon *the policy* to be used in procuring the franchise. That *policy* as agreed upon is stated on page 88 of the last amended bill, as follows:

"A candid statement and explanation of this action was to be made before the Street Committee or the Council of the City of Richmond, and Sheild, acting in behalf of himself and his former associates, and also in behalf your orator and his associates, was to apply to and secure from the Council of the city of Richmond the franchise set out in the said contract of August 9th, 1895." Here was plainly left to the discretion of said Sheild what method or policy he would use in procuring the said franchise. In the case of *Bryan* v. *Reynolds* 5

Wis., the words were "such claim to be brought before the Legislature in such mode and manner as my said agent and attorney may have the same presented." In *Trist* v. *Child*, the agreement with Trist was, that Child "should take charge of the claim and prosecute it before Congress as his agent and attorney." In *Elkhart Co.* v. *Crary*, 98 Ind. 238 the stipulation was for the use "of only proper persuasion." And in *Sweeney* v. *McLeod*, 15 Oregon 330, the stipulation was merely that the plaintiff would "by means of all legitimate importunity and submission of evidence, to prevent the passage of any law," etc. In *Tool Co.* v. *Norris*, *supra*, the contract was that Norris should secure a contract from the government.

In all of the preceding cases the contracts were condemned as being illegal by their terms. In the language of Judge Cassoday "none of these stipulations were sufficient to save either of such contracts from the condemnation of the respective courts. Where the principal object and purpose of an agreement is to secure, by a promise of a compensation contingent upon success, influence upon or with members of a Legislature or executive or other public official, it is none the less vicious in its tendencies because it is therein stipulated that such influence shall be 'reasonable and proper' the precise point is that such agreement, for such purchase of influence, is against public policy, and therefore void."

The discretion reposed in Sheild was unlimited and therefore more liable to abuse than the discretion allowed in the cases cited. And a contingent compensation was promised him in the repayment of his former expenses and he is represented by the bills as a designing and corrupt man, the very kind of man that is described in *Powers* v. *Skinner*, *supra*, when the court said. "The law will not concede to any man however honest he may be, the privilege of making a contract which it would not recognise when made by designing and corrupt men."

But the statements in the original bill throw a flood of light on the services agreed to be performed, and clearly show that they were what is known and condemned by the courts as

lobbying, and that such services were actually performed on behalf of the petitioner. In that bill (pp. 4 and 5) it is stated that while the petitioner was visiting Richmond urging his Conduit scheme, he became aware that certain parties, under the name of the Richmond Traction Company, were seeking the same franchise. "But these parties appeared to be without money or resources or *influence*." In striking contrast with this, he states the influence acquired by the petitioner and his associates over the City Council. He regarded "themselves as having altogether the *inside track*." They "appeared to be, indeed *were, masters of the situation*" (p. 4). Sheild is described as scheming to "get the *Conduit workers, who seemed to have the ear of the Council*" (p. 7), and it is stated that he succeeded in his endeavor (p. 8). There cannot be two meanings to these statements. They mean that the petitioner and his associates had exerted a *personal influence* over the members of the City Council in behalf of their Conduit scheme, which Sheild had failed to exert for his competing scheme, but which he determined to enlist in his behalf if possible.

That this influence was enlisted in behalf of the Traction scheme, as contracted for in the agreement of 9th August, 1895, is plainly stated (p. 8), and made a ground for recovery in this suit, in that it is given as a part of the compliance "in full measure" by the petitioner with his obligation under said contract. He says, upon his request, "your orator's entire working force went over at once to the Traction side openly and heartily," and worked with it in good faith "for the passage of the ordinance, some of them actually up to the very day the Board of Aldermen finally concurred in the ordinance as passed by the lower house" (p. 9). Now, remembering that these very workers had previously obtained from the Council an expression of preference for the Conduit scheme over the Trolley scheme, it could not be that they relied on argument to prove that the Trolley scheme was preferable. It must have been that they persuaded by personal appeals, or by some other personal influence, the members of the Council to adopt the Traction ordinance, in order that they might favor the peti-

tioner and his associates. In other words, having previously got control of the Council, as alleged, they now exerted that control by getting it to vote for a scheme it had refused to vote for before.

This use of personal influence has been condemned by this court in a number of cases, commencing with *Marshall* v. *B. & O. R. R.*

This Case not within the Class of Contracts represented by Brooks v. Martin, 2 Wall. 70

But the learned counsel for the petitioner take the ground (p. 75, &c., of their brief) that the contract, though contrary to public policy, has been consummated, and as one party has appropriated all the benefits, the court should aid the other to obtain his share; and they rely on a line of cases in which they give *Brooks* v. *Martin*, 2 Wall. 70, prominence. Before examining these cases, let us revert to the breach of contract sought to be enforced.

In the original bill (p. 10) and the last amended bill (p. 91) the petitioner relates an interview with Sheild on 23d August, 1895, three days before the Traction ordinance came up for action before the second branch of the City Council (pp. 11 and 91), in which interview Sheild admitted that "he had made other arrangements; in other words, he had dropped your orator and his associates." And it is added by the petitioner, "Repudiation of such obligations, at such time and under such circumstances, struck your orator dumb with amazement," &c. And in his card of the 26th August, the day the aldermen were to act (pp. 12 and 93), he admits the breach of the contract of the 9th August by Sheild as already made, and threatens suit to enforce compliance. Here, then, was a repudiation of the contract sued on before the ordinance was obtained, for which the contract had been entered into. This distinguishes this case from those relied on, in which the breach of contract occurred after one party had, by virtue of the contract, gotten possession of its fruits, and makes it doubly sure that the suit is to enforce the contract, as is indeed plainly stated in the bills.

But the doctrine as contended for is unsound. The mere appropriation by one party of the benefits of an illegal contract, after such contract has been consummated, does not warrant courts to enforce such contracts at the suit of the other party. In every case cited heretofore, in which this court and the State courts have refused to enforce such contracts, they had been consummated, and the defendants were in possession of their benefits, and the plaintiffs sued to force them to comply with their contracts. It cannot be, therefore, on that ground that such contracts can be enforced, as claimed by the learned counsel.

Nor does the fact that the parties to such contracts agreed to divide the profits of their enterprise, put the plaintiff in any better position, whether they are treated as partners or not. In the case of *Teal Co.* v. *Norris*, the plaintiff claimed under a contract for a proportion of the profits. *Maguire* v. *Cowan*, one-half of an attorney's fee was bargained for. In *Oscanyan* v. *Arms Co.*, a commission on sales was promised the plaintiff. In *Hunter* v. *Nolf*, and *Atchison* v. *Mullen*, the agreements were to divide receipts. In *Chippewa Valley &c.* v. *Chicago R. R. Co.*, *Gray* v. *Hook*, and other cases which might be mentioned, the agreements were like the one here, to divide what might be realized from the enterprise, and in *Powell* v. *Maguire* (43 Cal. 11), the agreement was almost identical with this. We submit therefore, that the agreement to divide does not help the plaintiff.

What then is the distinction on which the cases cited by the petitioner turned? It is this: *If the ground of relief is a contract subsequent to, and independent of, the illegal contract, and not requiring the enforcement of the illegal contract, it may be enforced.*

The first case in this court relating to this doctrine, was *Armstrong* v. *Toler*, 11 Wheat. 258, which was on a contract to pay for goods imported contrary to law. Chief Justice Marshall, delivering the opinion of the court (pp. 271–2), said:

"No principle is better settled than that no action can be maintained on a contract, the consideration of which is either

wicked in itself, or prohibited by law. How far this principle is to affect subsequent, or collateral contracts, is a question of considerable intricacy, on which many controversies have arisen, and many decisions been made"; and he concludes (278): "That where the contract grows immediately out of, and is connected with, an illegal or immoral act, a court of justice will not lend its aid to enforce it, and if the contract be, in fact, only connected with the illegal transaction, and growing immediately out of it, though it be in fact a new contract, it is equally tainted by it."

The case of *McBlair* v. *Gibbes*, 17 How., 232, arose on an assignment by the decedent of the plaintiff, to the decedent of the defendant, of an interest in an illegal contract, touching a military expedition against the dominion of Spain. The money claimed under the contract, had been paid to the assignee. The claim of the plaintiff was, that the contract being illegal, the assignment of it was void. The court refused to sustain this ground, holding, that the assignment to a third person, no wise connected with the illegal transaction, was good against the assignor. The English cases were reviewed, and the conclusion arrived at by Nelson, J., speaking for the Court, was, that "the assignment was subsequent, collateral to, and wholly independent of the illegal transactions upon which the principal contract was founded," and therefore valid between the parties to it and their privies (pp. 235-6).

In *Brooks* v. *Martin*, a partner in purchasing land warrants had first violated the law by purchasing soldiers' warrants before they were issued. This defect had been afterwards cured as to many if not all warrants so purchased. He had been trusted as the *agent* of the other partners, and having sold and realized in money a large proportion of the assets of the firm, had perpetrated a fraud on his partner in purchasing his interest in the assets. The court set aside the fraudulent purchase, and held that the defense that the transactions out of which the money or a part of it arose was illegal, was not good in the case, and quoted, with approval, the statement of the principle as laid

down by Lord Cottenham in *Sharp* v. *Taylor*, to-wit: "That the transaction alleged to be illegal is completed and closed, and will not be in any manner affected by what the court is asked to do between the parties," and that the difference between enforcing illegal contracts and asserting title to money which has arisen from them, is distinctly taken in *Tenant* v. *Elliot* (1 Bosanquet and Puller, 3) and *Farmer* v. *Russell* (Id. 29), and recognized and approved by Sir William Grant in *Thompson* v. *Thompson* (7 Vesey, 473).

In *Brooks* v. *Martin*, Catron, J., dissented on the ground that the partnership was formed to violate the act of Congress and public policy, but the majority held that the defendant, having admitted his indebtedness to the plaintiff after the close of the illegal transactions, *an assumpsit had arisen which was enforceable*. But there were also other potent elements in the case. The defendant was the trusted agent of the plaintiff, and after admitting an indebtedness, had deceived him in the settlement sought to be set aside. At page 79, Miller, J., who delivered the opinion of the court, used language directly applicable to the case at bar. He said: "*If Brooks, after the signing of these articles of partnership, had said to Martin*, 'I REFUSE TO PROCEED WITH THIS PARTNERSHIP BECAUSE THE PURPOSE IS ILLEGAL,' *Martin would have been entirely without remedy.*" HERE SHEILD REFUSED TO PROCEED WITH THE CONTRACT OF 9TH AUGUST, 1895, which is illegal, BEFORE ITS CONSUMMATION, and the defendants, as shown by the bills, have never admitted any obligation under it, or assumed any, but have persistently denied any such obligation from the time the petitioner first claimed it in his card of 26th August, 1895. By this authority, on which the petitioner relies, therefore, it plainly appears that he is without remedy.

The case of *Thompson* v. *Thompson*, approved in this case, contains a clear statement of the principle applicable in such cases as the one at bar. There the sale of a command of an East India ship had been illegally made for a stipulated annual payment of £200 to the previous commander. Afterwards the purchaser resigned the command, and received an

allowance from the company of $3,540 as a retired commander. The bill was filed to enforce the payment of the annuity by an investment of part of this fund, and it was defended on the ground that the contract to pay it was illegal. Sir William Grant sustained the defense, and in doing so said: "There is no claim to this money except through the medium of an illegal agreement. * * If the case could have been brought to this, that the company had paid the money into the hands of a third party for the use of the plaintiff, he might have recovered from that third person, who could not have set up this objection as a reason for not performing the trust; but in this instance the money is paid to the party. * * How then are you to get at it except through this agreement? There is nothing collateral in respect to which, the agreement being out of the question, a collateral demand arises." This fits the case at bar.

The case of *Texas, &c., Ry. Co.* v. *S. P. Ry. Co.* (41 Louisiana Annual, 970, and 17 Am. Rep., 445), is also clear as to this doctrine. There the suit was to enforce the payment of a balance under a pool agreement between the Ry. companies. The court held the agreement to be against public policy, as tending to stifle competition, and refused to enforce it. In this case the same ground was taken for the plaintiff, as is taken here for the petitioner, to-wit: that in so far as the contract had been executed, there was a right to recover. But the Court said: "The rule is, that no effect can be given to a contract reprobated by law, or contrary to public policy, and hence courts cannot lend their aid even to secure an otherwise fair division of the results of an illegal contract between the parties thereto." And after repeating the words of the Court, in *Gibbs* v. *Bal. Gas Co.* (p. 410), that "the rule of law is of universal operation, that none shall by the aid of a court of justice, obtain the fruits of an unlawful bargain," the court states the distinction on which the case of *Brooks* v. *Martin*, was decided, and says that it was not in conflict with the general rule.

The case of *Chicago &c. Ry. Co.* v. *Wabash &c. Ry. Co.*,

Circuit of Appeals, Eighth Circuit, 61 Fed. Reporter, p. 993, also arose on an effort to obtain a division of earnings under a pool agreement. The Court, Cardwell, J., delivering the opinion, refused the relief prayed for. And noticing the ground urged, that "the contract had been performed, and the appellee is bound to account for moneys received under the contract, according to its terms," the Court said: "This contention rests on a misconception of the character of this suit. The appellant's claim is grounded on the illegal and void contract, and this suit is in legal effect, nothing more than a bill to enforce specific performance of that contract. * * * The case of *Brooks* v. *Martin*, 2 Wall., 70, is not in point. In that case, the defendant set up an illegal contract, which been fully performed and executed, as a defense against a demand that existed independently of the contract."

In *Armstrong* v. *Am. Ex. Bk.*, 133 U. S. 433, 469, this court stated the distinction plainly in these words:

"An obligation will be enforced, though indirectly connected with an illegal transaction, if it is supported by an independent consideration, so that the plaintiff does not require the aid of the illegal transaction to make out his case." And cited for this distinction the following cases relied on by the learned counsel for the petitioner to support their position:

Faikney v. *Reynous*, 4 Burrow 2069.
Petrie v. *Hannay*, 3 T. R. 418.
Farmer v. *Russell*, 1 B. & P. 296.
Planters Bk. v. *Union Bk.*, 16 Wall. 483.
McBlair v. *Gibbs*, 17 How. 232.
Brooks v. *Martin*, 2 Wal. 70.
Big v. *Second Nat. Bank*, 79 Penn. St. 453.

So that these cases have received a judicial construction by this court adverse to the petitioner.

As the suit of the petitioner is to enforce his original illegal contract, and his prayer in all his bills is to that end, and he does not pretend that he relies on a subsequent, or collateral, contract supported by an independent consideration, he brings

himself wholly within the rule just cited from *Gibbs* v. *Bal. Gas Co.*, and under the condemnation of the above authorities cited by him. They show that when this court said that "there is a distinction between enforcing an illegal or prohibited contract and the assertion of a title to funds that had been realized out of such contract," (*Buck* v. *Taylor*, 152 U. S. 668) the court meant that such funds could only be reached by some other means than the illegal contract; that the case presented must be one in which the "plaintiff does not require the aid of the illegal transaction to make out his case."

Judge McCrary, in *Cook* v. *Sherman*, 20 Fed. Rep. 170, cited by Simonton, J., in the case at bar, states the distinction as above given. And there can be no question that this is the test of the principle on which the line of cases like *Brooks* v. *Martin*, relied on, turned. In none of these cases do the courts deny the general rule that in suits to enforce illegal contracts, courts of justice will deny relief, the parties being considered *in pari delicto*, but in every case in which relief was granted the court saw, or believed it saw, another contract, based on an independent consideration, "so that the defendant did not require the aid of the illegal contract to make out his case."

See also,

Sitler v. *Merry*, 15 Kansas, 157.
Bagott v. *Sawyer*, 25 S. E. 405.
Craft v. *McConaugh*, 79 Ill. 346.

An examination of the cases relied on for the petitioner shows no authority in conflict with these authorities.

The case of *Antoine* v. *Smith*, 40 Louisiana Annual Rep., 560, arose on a claim against a trustee to recover 200 shares of the capital stock of a Lottery Company. The trustee was bound to deliver the stock he held in trust to the owner, independently of the illegal manner in which the owner acquired title, as the trustee had no claim to it as his own property, but simply held for the claimant. Here the court enforced a *trust* which was independent of the illegal transactions plead in defense.

The case of *Manchester, &c., R. R.* v. *Concord R. R.*, 66 N. H., 100, arose from a contract for the possession and operation of the plaintiff by the defendant railroad, and the plaintiff sought the return of its property and an account of what was done under the contract. The court held that the contract was not against public policy, but valid and binding. The discussion, therefore, of the doctrine of *Brooks* v. *Martin*, if not *obiter dictum*, was not necessary, and in so far as it is sought to construe it differently from the construction put upon it by this court in *Armstrong* v. *Am. Ex. Bank*, *supra*, and other authorities cited, is not to be allowed.

In *McMullen* v. *Hoffman*, 75 Fed. Rep., 547, arising on an agreement between contractors with the city of Portland, the court held the contract sued on "was to do a lawful thing," and added: "It is only when the fraud is the result of an immoral transaction that contribution between wrong-doers will be denied."

In *Willson* v. *Owen*, 30 Mich., 474, the suit was against the treasurer of a Horse-Fair Association. The treasurer only held the money in trust for the plaintiffs. He was bound to pay it to them, irrespective of any illegality in the conduct of the horse-fair. The court said that had the treasurer been a party to the illegal transaction, the recovery would be barred.

In *Gilliam* v. *Brown*, 43 Mississippi, 641, the illegal traffic in cotton during the late war was not held by the court as being by parties as *partners*. The third instruction granted the plaintiff by the Circuit Judge (page 658) and approved by the Appellate Court, is thus described: "This instruction asserts the proposition that although the traffic in cotton between a resident of De Soto county and parties residents of Memphis, Tenn., was illegal, at the time part of the transactions out of which this suit originated were carried on, yet if James C. Brown took the plaintiff's cotton, with his consent, and as his agent carried it to Memphis, and there sold it and received the money, which his executor, the defendant, still had * * * the plaintiff was entitled to the money, the proceeds thereof." Here the person who received the money arising from the ille-

gal traffic was an *agent*, and the courts have never allowed him to withold the money of his principal on the ground that that principal had his right to the money tainted by some illegal transaction. No such defense is allowed to an agent or trustee, whose obligation is to pay the fund in his hands to the principal. The long extracts from the opinion in this case made by the learned counsel, are to be taken in connection with the real question before the court, and are only of force in that connection. If it is shown that the court said anything conflicting with the doctrine of this Court and of the many other State Courts heretofore stated, it will only show that this Mississippi Court is in error, and its opinion of no weight.

The case of *Martin* v. *Richardson*, 42 Am. St. Rep., 353, 94 Ky., 183, was one against a man, who having fraudulently obtained anothers lottery ticket, which had drawn a prize, collected the money and refused to pay it over. Here was plainly a case of one having fradulently obtained the money of another and refusing to pay it over, and the court held he was in effect, the agent of the plaintiff.

Remedy at Law.

The petitioner has a plain, adequate, and complete remedy at law, if any he has, and therefore equity has no jurisdiction.

The petitioner sues upon a contract which he claims entitles him "to a full one-half interest in the Traction Company's enterprise and franchise," and he prays that he may be decreed "to have a right and claim to a full one-half interest in the said Richmond Traction Company's franchise, enterprise, property and *stock*," (p. 16). This prayer is repeated in his amended bills (p. 111). So that, as the franchise, enterprise, and property of the company, are represented by the stock, he asks to be decreed one-half of the stock, which he states had been fully subscribed for by the defendants (p. 99). The Act of Assembly (see Appendix), fixes the maximum amount of stock at $300,000, and the petitioner's bills state that this amount had been subscribed for by the defendants.

This then, is a suit for stock, claimed by the petitioner under his contract, and withheld by the defendants. *Story on Equity*, §724, says: "The doctrine seems to be well settled, that a contract for the sale of stock, will not now be decreed to be specifically performed, because it is ordinarily capable of exact compensation." In *Mechan. Bank* v. *Seton*, 1 Peters, 305, this court held that on a breach of contract for the sale of stock, the remedy was at law.

See *Ross* v. *Union Pas. Ry. Co.*, Woolw., 26; *Eckstein* v. *Downing*, 64 N. H., 248; *Baugardner* v. *Leavitt*, 35 W. Va., 202; also *Cook on Stockholders*, § 335, and *Lindley on Partnership*, p. 914.

The case of *Powell* v. *Maguire*, 43 Cal., 11, 19, affirmed in *Thomason* v. *De Greager*, 31 Pac. Rep. (Cal. 1892), 567, is exactly to the point. There, as here claimed, promoters agreed to get a franchise in the name of one, and then divide it. On obtaining it, the one in whose name it was granted, refused to allow the other any interest. The court held it was a case for damages at law, and not in equity. In doing so it looked upon the promoter's agreement as one for a partnership, as has been urged here, and held that such an agreement could not be enforced by specific performance. The two cases are as much alike as the two Dromios.

In *Thomason* v. *De Greager* (Cal.), 31, Pac. Rep., 567, which was an action on the part of the plaintiff to have his name inserted as one of the parties to a contract between the defendant, and a corporation (for paving). The Court said:

"It is alleged that the terms of a co-partnership between plaintiff and De Greayer, to do the work of paving, etc., of five miles of track for said corporation, were fully agreed upon by the parties, but this was before any contract was obtained, and the partnership was therefore never 'launched.' This being so, the rule declared in *Powell* v. *Maguire*, 43 Cal. 11, is applicable."

There has not been pointed out anything about the stock in question, which takes it out of the general rule. Its value

can be easily estimated, indeed, is put by the plaintiff himself at par, when he insists that subscribers should pay par value, and if worth more, the excess would constitute the damages.

The claim that the petitioner is entitled, by being a stockholder, to take part in the management of the concern, would apply to every case of a claim for stock.

It is to be remembered too, that the breach of the contract between the parties, is alleged to have occurred before the company was incorporated, and consisted in refusing to put the petitioner's name among the incorporators provided by the ordinance, and in refusing to recognise him as interested in the enterprise. The money value of his loss, by reason of this breach, is easily ascertained. He himself puts it at the amount he had expended in urging his Conduit ordinance, and the value of one-half of the Traction stock. To give him in damages, his expenses, and the market value of the stock claimed, less its par value, would give him a *plain*, *adequate*, and *complete* remedy.

This a court of law could and would do, if he proved his case, and as he has this plain remedy at law, he has none in equity (§ 16 Judiciary Act, 1 Stat. 82, § 723).

The learned counsel, heretofore pressed by this argument, now shift to inconsistent grounds, and claim (p. 109 of their brief) that the contract sued on created a partnership relation between the parties, and that the remedy at law is not adequate in such a case. This is to claim that after a contract of partnership is entered into, and before the partnership has acquired any assets or entered upon its business, if one party repudiates the contract, the other can, in a court of equity, enforce specific performance. This is against all authority. A partnership being a confidential relation, must be *voluntary* (Collyer on Partnership, § 8; Lindley on Partnership, 914). Here Sheild, while the efforts were being made to obtain the franchise which was to be the subject of the partnership, repudiated the contract, and the professed object now is to force him and his associates to receive the petitioner as a partner.

No authority is cited for such a proposition, nor can there be. The case of *Stringfellow* v. *Wise*, 27 S. E. Reporter, 432, relied on, was one where advances in the shape of labor, materials and money had been made for a proposed partnership never consummated. An account was allowed between the parties, but the parties were not forced to carry out the proposed partnership. In the case at bar the petitioner asks no account of his advances—he can render that himself, if he made any—but asks to be forced into a partership with the defendants.

The case of *Stuart* v. *Pennis*, 91 Va. 688, cited for petitioner, is not at all to the point. There a man sold the trees on a piece of land for three years. The court held that the trees were a part of the realty; but had they not been, the purchaser had a right to keep the trees standing for three years, and his profits would be difficult to estimate. But in addition, it appeared that the vendor refused to allow the vendee to come on the land to count the trees, and the court gave that as a reason for equitable relief, as it obstructed the remedy at law. No partnership or stock was involved.

Misled by this case, the learned counsel have admitted an alternative construction put upon the contract by counsel for the defendants, the other construction being that the promoters intended to sell the franchise and divide the money.

They quote, with approbation, the following sentence from our first brief in the Circuit Court: "If it (the contract) entitles the plaintiff to anything, it entitles him to a certain sum of money, represented by one-half of the profits of the Traction Company, r alized during its existence—to-wit., from 28th August, 189 the date of the city ordinance, to 1st January, 1926," when the charter under the ordinance expires. (See their brief, pp. 107-8.) This admission is fatal to their case, for if the construction is correct, there can be no right of action for the breach of the contract till 1st January, 1926, as until that time the amount claimed by the petitioner as his share of profits cannot be ascertained, nor become due.

But granting that the contract is not tainted with immorality, the petitioner can have no remedy in Equity, even if he has none at Law, because the

Petitioner's Conduct and the Relief he Seeks are Inequitable, and the Prayer of his Bill Cannot be Granted.

Says Pomeroy, §399–400: "The principle was established from the earliest days, that while the Court of Chancery could act upon the conscience of the defendant and force him to do right and justice, it would never thus interfere on behalf of a plaintiff whose own conduct in connection with the same matter or transaction had been unconscientious or unjust, or marked by a want of good faith, or had violated any of the principles of equity and righteous dealing, which it is the purpose of the jurisdiction to sustain * * * The maxim, considered as a general rule controlling the administration of equitable relief in particular controversies, is confined to misconduct in regard to or at all events connected with the matter in litigation, so that it has in some measure effected the equitable relations subsisting between the two parties and arising out of the transaction. * * * A contract may be perfectly valid and binding at law; it may be of a class which brings it within the equitable jurisdiction, because the legal remedy is inadequate; but if the plaintiff's conduct in obtaining it, or in acting under it, has been unconscientious, inequitable, or characterized by bad faith, a court of equity will refuse him the remedy of a specific performance, and will leave him to his legal remedy by action for damages. * * * The doctrine thus applied means that the party asking the aid of the court must stand in conscientious relation towards his adversary; that the transaction from which his claim arises must be fair and just, and that the relief itself must not be harsh and oppressive upon the defendant. By virtue of this principle, a specific performance will be refused * * when the contract itself is unfair, one-sided, unconscionable, or effected by any such inequitable fea-

ture; and when the specific performance would be oppressive upon the defendant, or would prevent the enjoyment of his own rights, or would in any other manner work injustice."

We submit that in this case the plaintiff has so acted, and the relief he seeks is so harsh and inequitable that his bills should be dismissed.

In his said contract of the 9th of August, 1895, he describes himself as L. H. Hyer, of Washington, D. C. As a resident of the District of Columbia, he had no right to file a bill in the United States Court for the Eastern District of Virginia. He, therefore, in his bill to enforce said contract, which he takes care not to swear to, describes himself as "L. H. Hyer, a citizen of the State of Missouri, residing in Warrensburgh, Johnston county, State of Missouri" (page 2).

By his said contract he agreed to co-operate with Sheild, and his associates, in procuring the franchise for the Richmond Traction Company, yet while the ordinance was pending, and a few hours before it was to be considered by the Board of Aldermen and the Mayor, he published in an evening paper of the city, at a time selected when a timely answer through the same channel was impossible, his card of the 26th of August, (pp. 92–93) which plainly had for its purpose the defeat of the said ordinance, by throwing a discredit upon the good faith of the corporators seeking the ordinance, and upon their ability to properly exercise it if granted. In the said card he threatens a suit against the said Company, and then adds his belief that litigation will prove fatal to the enterprise. He asserts that he was entitled to one-half of the franchise; that Stewart & Co., bankers, were entitled to one-third, that Wm. F. Jenkins was entitled to about one-half; and that certain bankers in Richmond were to have a greater portion of the franchise for financiering the same.

As his half and Jenkins half would make the whole franchise, and Stewart & Co., would be entitled to one-third in addition, and the Richmond bankers would be entitled to a greater portion of the whole besides, the card contained the statement that the gentlemen composing the Traction Company were

utterly unreliable, and were already under contracts which it was utterly impossible for them to comply with. His excuse for publishing such a card was to give notice of his rights and claims under his contract (p. 92). That this excuse was a false one, appears by the statements in the bill (p. 90), that the said contract of the 9th of August was not only fully known to the Council but to the public generally, and that the promoters and incorporators had personal notice of it. This threat of a suit by the appellant was met by a leading member of the Traction Company, in the same paper on the next day, and after the ordinance had been passed by the Aldermen, in which he stated that he never heard of Mr. Hyer until he saw his card: that upon inquiry he was satisfied that his claim could not be sustained; that his action was probably inspired by the enemies of the Traction Company; and that the Company would pay no attention to his claim, but would commence their work soon after the Mayor approved the ordinance, preparation for the plans for the same being already well underway. This card was made a part of the appellants bill (p. 94). The appellant with a full knowledge that his claim would be resisted, persisted in attempting to have it allowed, or to force money from the Traction Company in satisfaction of it, by a course which can be described by no more appropriate term than that of blackmailing, the first steps in which was the publication of his said card of the 26th of August. His next step was his notice to the corporators dated the 3d of September, 1895, threatening forthwith to apply to the courts to stop them from issuing bonds or stock, if the rights of himself and his associates were not recognized and conceded; a notice entirely unnecessary as a notification of his claims, as it concludes with a disclaimer of an admission that said incorporators were not all along aware of his asserted rights. Instead of filing his bill forthwith upon the passage of said ordinance or service of said notice, he waited till the 30th of October, 1895, nearly two months, before filing it, and this with a full knowledge that under the ordinance, the Company was bound to organize and

commence its work within ten days from the approval of the ordinance by the Mayor, to-wit by the 7th of September.

Had he had any confidence in his claim he would have filed his bill immediately upon the passage of the ordinance, and gotten the court to order the corporators to allow him to subscribe for half of the stock upon the organization. In the bill which he filed, he prayed that the corporators, parties defendant, be enjoined and restrained from transferring or encumbering the franchise or property of the said Richmond Traction Company, or any part thereof, or any interest therein, or from issuing any stock or bonds of said Company, or in any other way borrowing money for the use of said Company upon its franchise," p. 16.

In other words, that the operations of the Company be suspended. This bill was not presented to any judge for action by preliminary injunction, as it should have been if its allegation was sincere, that the appellant would be exposed to irreparable injury if his prayer was not granted. Although a demurrer was filed to this bill the day after the bill was filed, the appellant did not join in the demurrer, nor ask for it to be set down for hearing at once, but on the 14th of November, he asked to amend his bill, and on the 4th of February, 1896, he asked to file another amended and supplemental bill.

In pursuance of permission granted him on the 4th February, 1896, the plaintiff filed an amended and supplemental bill, complaining of the issuance of stock and bonds by the company, and of a mortgage to secure the bonds, dated 1st November, 1895, and recorded 4th November, 1895, and after repeating the prayer of his original bill, praying in addition for an injunction to prevent the issue or disposition of the said bonds, and to prevent "The Traction Company, its officers, &c., from entering into any contract or incurring any debt or liability, or exercising any of the rights, powers, functions, or privileges of the Richmond Traction Company, and that a receiver may be appointed" (p. 44); he also prayed that every act of the said company be annulled (p. 44). He thus asks

that the enterprise be killed, as the ten days to begin work had long before expired, and more than five of the nine months allowed to finish the work had passed. This bill was at once demurred to and the heads of the demurrer were stated. And the demurrer was ordered to be heard during the term. This demurrer exposed the fact that under certain allegations in the bill, the appellant was seeking relief on transactions plainly against public policy.

On motion of the defendants on the 11th day of February, 1896, the plaintiff showing no desire for a hearing, the cause was set for the 1st day of April, 1896 (p. 65), though the appellant had not yet joined in either of the demurrers.

But instead of coming prepared for said hearing the appellant filed a long petition, asking that he might further amend his bills and strike out certain passages and insert others, as we have seen, with the purpose of cleansing his case. His bill, so amended, was filed 15th April, 1896, and a demurrer was filed to this at once (p. 119), though it is incorrectly stated in the record as having been filed the 4th of May. Finally, upon the 5th of May the cause was heard. Up to that time the appellant had not moved the court to grant the injunctions prayed for, while by the ordinance he had exhibited with his original bill the franchise would have been forfeited if work had not commenced on or before the 7th of September, 1895, and the work must have been so far advanced at the hearing as to be completed by the 28th of May, 1896, and by the showing of the amended bills the money to construct the railway had been altogether raised on bonds of the company, then prayed to be annulled, and their issue, together with every act of the company, to be declared unlawful and void, but their property to be divided with the appellant.

Now what does all this harsh remedy prayed for, and not pushed, so as to prevent the actions complained of, actions obliged to be performed to save the franchise of the company, mean, but to allow the company to go on with its work, and then to wipe out the issue of stock and bonds if possible, and divide the property of which the company had gotten poses-

sion, without paying its obligations. A more iniquitous proposal was never submitted to a court of justice. The learned counsel in argument, admit that the plaintiff did not push his prayer for injunction, because he did not want to kill or cripple the company he sought an interest in; what was his intention then, unless it was blackmail in trying to force allowance of his claim by threatening destruction of the company, if it was not allowed? Indeed, this plaintiff has gone so far in his amended bill, as to attack the constitutionality of the act granting the charter to the corporation in which he claims half interest. We have learned of nothing equal to this since the days of Solomon, when a spurious mother confessed herself willing to kill the child she claimed, and divide its dead body, rather than the true mother should have her live child to nourish. The judgment of Solomon in that case is a prevalent precedent in this.

But if the appellant could clear himself of this improper conduct, exhibited in the record, he still would be in the attitude of one asking for half the franchise in a corporation, which could not be granted except by the issue to him of one half its capital stock, and he prays this, without ever having offered in his bills to subscribe and pay for the same, and without giving any excuse for not offering to furnish half the $10,000.00 required to be deposited by the company as a guarantee for the performance of the ordinance, which brought the company into existence, and gave that existence continuance, a very different sum from that withdrawn by the appellant, 17th August, 1895.

The learned counsel rely much on the retention in Richmond of $10,000.00 by the petitioner, until that date. It is evident however, that that had no influence on the action of the Council. The contract states that this deposit in the State Bank, was to be "subject to any conditions for the withdrawal thereof, made by Mr. Hyer with the depositor, after the 17th August, 1895." Then the deposit was not to the credit of the city, but of a third person, described as "the depositor." The lower branch of the Council met, and passed the Traction or-

dinance, on 14th August, 1895 (pp. 90 and 91), which required that company to *deposit with the Treasurer of the city* within ten days from the approval of the ordinance, bonds of the city of Richmond, or U. S. currency, for $10,000.00, to be forfeited to the city if the company failed to commence work within ten days, or complete it within nine months (p. 18). *This deposit secured the franchise to the Traction Company.* It was not the money previously deposited by some one at Hyer's instance, to be withdrawn on 17th August, 1895, and actually withdrawn that day, as stated in the bills (pp. 88 and 89), but an amount furnished by the corporators of the Traction Company, after the approval of the ordinance on 28th August, 1895, and the withdrawal of the previous deposit by Hyer's friend. And of this last deposit, the petitioner should have furnished one-half according to the interest he claims in the company, but not one dollar of which he ever offered to furnish, so far as his bills show. It is therefore useless to claim that the first deposit was the basis of the Traction Company's application for its franchise, unless it is also stated that this sum was not subject to withdrawal by the depositor, but was put to the credit of the Treasurer of the city, as required by the ordinance, which is not alleged, and was not the case. The sum deposited in the State Bank, was withdrawn before the final passage of the ordinance, and therefore could not have caused that passage.

The plaintiff's bill was filed 30th October, 1895 (page 2), and his amended bill, at page 37, states that some time in September, 1895, the whole of the capital stock was subscribed for by others. Thus the defendant company was disabled from specifically performing the contract as asked, if ever bound by it, before the plaintiff sued. Indeed, the counsel for plaintiff are understood as admitting that it is not in the power of the company to specifically perform the contract sued on, as it has not the stock to deliver. So the doctrine in *Kennedy* v. *Hazleton*, 128 U. S., 667, is applicable here, as the plaintiff asks what the company is not able to perform.

Again, the complainant asks for a relief which no court

can grant. The corporation cannot be forced to take him as a stockholder, and if the present holders of stock could be made to transfer to him one-half of their holdings, that would not satisfy his demand, for he claims that he cannot have full relief unless the company and its franchise be discharged from the consequences of its organization, and from all contracts, debts and liabilities contracted in its name. And how is this to be done? Are all obligations to be repudiated? Are all completed contracts to be re-opened and annulled? And are the stockholders, including the appellant, to be relieved of all obligations while they hold the fruits thereof, or is only the appellant to be so relieved? And finally, is the corporation to be declared illegal and its franchise forfeited, and then the appellant to have half of nothing?

If the court were to undertake to grant the relief prayed for, it would find itself hedged in by innumerable difficulties.

The excuse for not offering to subscribe for half of the company's stock, is not sufficient. When, in the notice to the corporators, 3d September, 1895 (page 95), Hyer claimed "a full half interest in the franchise," why did he not also offer to subscribe for half of the stock? He knew that by the 8th September the company must organize, commence work, and put up $10,000.00, and that the stock would be subscribed for by that time. Yet he does not offer to subscribe, nor to aid in raising the $10,000.00. Such offers were essential to the preservation of the rights he claimed.

The learned counsel (p. 98 of this brief) claim that while the allegation of a fraudulent intention in the defendants is not admitted on demurrer, yet its truth is admitted "in so far as requisite to give the court jurisdiction." This remarkable proposition, advanced only on the authority of the learned counsel themselves, is contradicted by all other authorities.

Buzard v. *Houston*, 119 U. S., 347–352.
Sumestin v. *Silver Min. Co.*, 41 Fed. Rep., 249, 256.
Carmody v. *Powers*, 60 Mich., 26.

It ignores the fact that the intention of the defendants

must be shown by their acts, and not by allegations of the plaintiff. The passage shows, however, the motive of the petitioner in his reckless charge of fraud against the defendants. That charge was made, not because true, but to obtain a foothold in a court of equity. Such a court, on the discovery of the motive of the bill, will drive the libeller from its halls.

Procul, O procul, Este profanus!

Contract Wanting in Certainty and Mutuality.

The law on the subject of uncertainty is stated by Pomeroy on Equity, § 1405, as follows: "It (the contract sought to to be performed) must be reasonably certain as to its subject-matter, its stipulations, its purpose, its parties, and the circumstances under which it is made." See, also, *Colston* v. *Thompson*, 2 Wheat (U. S.) 336. The contract here is uncertain in these particulars. Is the subject-matter the building of a street railway on Broad street, or simply the obtaining a franchise for that purpose, or both? What was meant by "mutually to co-operate one with the other in securing a franchise for said railway?" What was to be done under this provision of the contract? The plaintiff has stated different and contradictory duties. Was the purpose of the parties to form a partnership or merely to divide the franchise, or to divide what was realized from it by sale or exercise? Who were the parties? Who were the associates of Hyer, and who of Sheild?

All of these questions are left in doubt by the contract sought to be enforced, while all of them require a definite answer to specifically perform it. While by the agreement to "divide equally between us and our associates whatever may be realized from the enterprise," indicates a partnership, as in *Powell* v. *Maguire*, *supra*, the relief asked is for stock only, which negatives the idea of partnership, as partnership could only be dissolved by mutual consent, while the stock can be sold at any time. The attempt to make clear the contract by stating understandings of it not in accordance with its language is not allowable, as the paper must speak for itself, and not

through interpretations of parties, which are not allowed on demurrer. *Dillard* v. *Bernard*, 21 Wal., 430–437.

The case of *Hissam* v. *Parrish*, 24 So. E. Reporter, 600, decided by Supreme Court of West Virginia, is authority on this point, as also on the next to be noticed—to-wit: mutuality required.

Fry on Specific Performance, § 266, states the rule of equity as follows: "A contract to be specifically performed must be mutual; that is to say, such that it might at the time it was entered into have been enforced by either party." Hence, had Hyer refused, after signing the contract, to withdraw his conduit scheme from the Council of Richmond, or to co-operate with Sheild in securing the Traction charter, which he finally did, or if he now refuses to subscribe for half of the authorized stock, which he does not offer to do in his bill, no court could have forced, or can now force him. This position is fully sustained in *Smith* v. *Applegate*, 3 Zab. (N. J.) 352; *Moore* v. *Fitz Randolph*, 6 Leigh (Va.), 175.

The case of *Hissam* v. *Parrish*, decided March 21, 1896, is authority for several positions taken by the defendants here. There was a contract for purchase of stock by a corporation, but only signed by members of the company; the sale, however, was optional with the plaintiff. The court, in an able opinion by Judge English, held that the allegations in the plaintiff's bill, as to the consideration of the contract, could not be considered on demurrer, not being found on the face of the contract sued on; that there was a want of mutuality, as the defendants could not enforce it against the plaintiff, and there was an uncertainty as to parties, the body of the paper purporting to be a contract with a company, while the names signed were those of individuals. Here the plaintiff seeks by allegations to make a different contract from that set forth in the paper sued on; he is at liberty to claim the benefit of the contract or not, as he pleases; and if he declines to do so he cannot be compelled to carry it out by subscribing and paying for the stock he now claims, as he nowhere binds himself in the contract to do so, but leaves it optional with himself, and

if the court were to grant him the relief prayed for on condition that he pay for the stock, he could decline, and could not be compelled to do so. The uncertainty of parties, too, is apparent here. The plaintiff sues on a paper signed by himself and Sheild, and purporting to be on behalf of associates, not named, and attempts to hold a company liable, not then in existence and not named as an obligor, and corporators not then stockholders in the company.

Contract is one between Promoters which cannot be enforced against the Defendants

Under this head of the argument, we refer to the rule laid down in *Redfield on Railroads*, 5th Edition, § 6, page 18, as the proper one. "Whenever a third party enters into a contract with the promoters of a railway, which is intended to enure to the benefit of the company, and they take the benefit of the contract, they will be bound to perform it."

It will be seen that the contracts so binding, are restricted to those of *third* parties, with promoters, of which the corporations took the benefit. It is very different where promoters agree among themselves for a division of stock, or for other personal benefit.

In such cases the corporation is not bound, even if its existence was the result of the action of the promoters, as that action was merely intended for their benefit. Here it is contended that an agreement between promoters to divide *profits of an enterprise*, binds the future corporation to divide its *stock* between them. A mere personal contract which does not pretend to bind the proposed corporation to do anything. Those entitled to the profits are to divide, not the corporation. The learned counsel rest their argument on this point, on the decisions of Lord Cottenham, which were disapproved afterwards by Lord Campbell, Lord Romilly, Lord Cranworth, Vice-Chancellor Kindersley, and the House of Lords, as appears in the case of the *Earl of Shrewsbury* v. *North Staffordshire Railway Co.*, L. R Eq. Cases, Vol. I, p. 616, and also in *Preston* v. *Liverpool, &c., R. Co.*, 5 H. L., Cas. 605. The

learned counsel in referring to this first decision, quotes from sylabus, which makes the decision to rest on the fact that the performance of the contract in that case, by the company, was *ultra vires*. But they do not state why it was considered *ultra vires* by the Court. An examination of the case, shows that the promoters promised to pay the Earl of Shrewsbury £20,000 to secure his support and countenance, in lieu of his opposition to the Act granting their charter. This, the Court held, was against public policy, although it did not appear that he did anything improper regarding the passage of the Act. And because illegal, the Court held it was not within the lawful powers of the company to pay the money, that it was therefore *ultra vires*, although the company had formally ratified the contract and assumed the payment of the money. In this case, the company owed its existence to a withdrawal of opposition by the Earl, and his counsel urged that as a ground on which it should be held bound, but it did not prevail. The same argument by the learned counsel here, must meet with the same fate. But we need not go to England for authority on this point, as we are full-handed with American decisions. In *Am. & Eng. Encyc. of Law*, Vol. IV, p. 301, note 1, it is stated that the "general principle is, that a corporation can only be liable for its own acts, done after it had legal existence. Promoters do not represent the corporation in any relation of agency, and have no authority to make preliminary contracts, binding the corporation when it shall be formed. Mere acceptance of the benefit of a contract, does not imply a promise on the part of the corporation to adopt and perform it." See also

1 Morawetz on Corporations, section 547.
Franklin Fire Ins. Co. v. *Hart*, 31 Md., 59.
Abbott v. *Hapgood*, 150 Mass., 252.

The American authorities given for this text are numerous. In *Carmody* v. *Powers*, 60 Mich., 26, which was a suit upon a contract with promoters for the sale of an engine and machinery for sawing, to be partly paid for in paid-up stock of a company to be formed, the court held (p. 30): "An agree-

ment with individuals, that when they become incorporated they will give plaintiff a certain amount of paid-up stock, cannot on any rule of law be considered as a dealing with the corporation itself, or as one which would bind the future corporation when organized." Here, it will be seen, that the fact that the company got the engine and machinery did not oblige it to issue the stock. But the learned counsel, after the effort to support their contention, that the Traction Company is bound by the contract of 9th August between the promoters, finally conclude that it is not essential to the establishment of their position, which they define to be not a recovery against the company by virtue of the contract; rather that the plaintiff had a right to be, and should have been, in and of the company.

THE EFFORT, THEREFORE, IS TO FORCE THE COMPANY TO RECEIVE THE PLAINTIFF AS A STOCKHOLDER.

No authority is cited, and none can be, we venture to say, for the proposition that a corporation can be forced to receive persons as stockholders who have never subscribed for the stock, or who having offered to subscribe, were refused the privilege by the corporators. On the contrary, the law is that the Legislature entrusts to the corporators the right and power to select the stockholders after the incorporation, and as the subscription is a contract with the incorporators, both they and the subscriber must agree to it.

Cook on Stockholders, &c., § 52.
Wood on R. R., § 21.
Powell v. *Maguire*, 43 Cal., 11, 21.

In this latter case the court was called on to enforce a contract between two persons, by which the franchise of a ferry was to be obtained in the name of one and his associates, and the two were to divide the franchise between themselves and their associates. The franchise was obtained, and then the person in whose name it was granted refused to divide, and put in a boat at his own expense. The bill asked for a specific performance of the contract, by letting the plaintiff into half

of the franchise. There could hardly be found a case more like the one set out in the plaintiff's bill here. The relief asked was refused. On page 21 the court says: "When the Legislature grants a franchise to a particular person, his associates and assigns, it delegates to him the right to select the persons thereafter to be associated with him in the enterprise. * * If several persons desiring to obtain a franchise from the Legislature, in which they are all to be mutually interested, see fit to ask it in the name of one only, public policy requires that they should be made to rely solely on his good faith in carrying out the agreement; if he repudiates the contract on obtaining the franchise, a court of equity will grant no relief." The case made in the bill here is even stronger against relief than the one in *Powell* v. *Maguire*, for the plaintiff states that the contract was repudiated before the passage of the charter of the Traction Company, and that the Board of Aldermen were informed of the repudiation and of his claim under it by his card of 26th August, 1895. Then it follows that the Board of Aldermen and the Common Council determined, after knowing of his claim, not to put him among the corporators, but to entrust the enterprise to those inimical to him. Having so entrusted the franchise, a court of equity, even if empowered to enforce the previous contract, would be estopped from doing so, for plainly the Council, in granting the franchise, determined that the plaintiff should not be one of the corporators to whom they gave it. Should a court force a corporation to accept as a corporator, or stockholder, one whom the Legislature has excluded from the franchise? The bare statement of such a proposition shows its absurdity. *Chippewa R. R.* v. *Chicago, &c., Co.*, 6 L. R. A., 609; 75 Wis., 224. The plaintiff states (p. 11) that on the day after his contract with Sheild he wired his friends in Richmond to have his name inserted as corporator in the Traction ordinance, as proposed by Sheild. It was not so inserted. Why? There was no breach of contract pretended at that time. It must have been, therefore, that the Common Council, disgusted with the defendant's conduct in withdrawing a scheme they had approved, and combining with

promoters of the competing scheme, refused to allow his name to be inserted in the Traction ordinance.

We might well rest our argument here, but justice to our clients requires some notice of other grounds discussed by the learned counsel for the petitioner, as bearing on the jurisdiction of the court.

Quo Warranto Should Have Been Resorted to in the Attack upon the Corporation

The bills attack the organization of the Traction Company, and charge a misuse of the franchise granted it.

We would refer the court to Chapter 145 of the Code of Virginia, 1887, commencing with Section 3022, wherein the proceeding by writ of *quo warranto* is provided in cases against corporations for a misuse of their corporate privileges and franchises, or for the exercise of privileges or franchises not conferred upon them by law, and against persons for the misuse of any privilege conferred upon them by law, or for acting as corporations without authority of law.

Here is a plain remedy at law provided by the sovereign power, whence issue all franchises, to enquire into their exercise, and to declare forfeiture where improperly exercised.

This direct proceeding which might have been had at the instance of the appellant, under the provisions of said chapter, should have been had before he had a right to come into chancery, for the fact of forfeiture cannot be enquired into collaterally, unless the proceeding by *quo warranto* be first had.

This was expressly held in—

Crump v. *U. S. Mining Co.*, 7 Gratt. (Va.), 352.

See also—

Banks v. *Poitaux*, 3 Rand. (Va.,) 136.
Pixley v. *Roanoke Nav. Co.*, 75 Va., 320.
National Bank v. *Mathews*, 98 U. S., 621.
National Bank v. *Whitney*, 103 U. S., 99.
Reynolds v. *Crawfordsville Bank*, 112 U. S., 405.

Without having resorted to their writ of *quo warranto*, the

appellant, by his amended bills, attacks the validity of the Act of Assembly under which the defendant company was incorporated (page 107); attacks the organization of the company and the issuance of stock (pages 100 and 101); attacks the act of the corporation in borrowing money and giving securities therefor (page 103), and thus attempts collaterally to bring in question the most important acts of the corporation and those comprising it, claiming that they are in the exercise of privileges not conferred by law.

Upon the setting aside of these acts the appellant rests his right to relief in the case (p. 111), and therefore his bill is fatally defective.

Charter Act and Code of Virginia.

In order to obtain equity jurisdiction, the appellant has attacked the issue of the bonds of the Traction Company as illegal, charging that the Act of Assembly of the 20th of March, 1860, in so far as it authorized their issue, was void, because the said provision was not embraced in the title, and because under section 1232 of the Code of Virginia the Company was prohibited from borrowing money until its capital stock was paid in and expended. As regards the said Act of Assembly, it is sufficient to say that its title being, "to authorize the Common Council to authorize persons to construct railroads in the streets of the said city," all provisions of the act which embraced "objects connected with and in furtherance of the main general object of the act" come within the title.

Powell v. *Supervisors of Brunswick County*, 88 Va. 707–714.
Thompson Com. on Corporations, sec. 608, *et seq.*

In order that the said street railroad might be constructed it was proper that the contractors be made a corporation; such work was usually done by corporations; and as it was proper to make them a corporation, it would of necessity be subject to the laws relating to corporations. It was accordingly placed under the two chapters of the Code of Virginia relating to

such bodies, and the provisions of the act complained of are but modification of those provisions.

It is but proper to say that this question has been raised upon this charter in other suits, and has been decided in favor of the Company, both by the Circuit Court of Henrico County, and by the Judges of the Virginia Court of Appeals, who have refused to enjoin the company in its work on that ground.

As to the section in the Code of Virginia, it will appear upon its face, that where the Company was expressly authorized by its charter, it could borrow money without first expending subscription to capital stock; and by the 5th section of the said Act of the 20th of March, 1860, which is the charter of the Traction Company, it was especially authorized at "*any time* to borrow money for the purpose of building, equipping, and extending their roads, and issue bonds therefor, bearing interest not exceeding eight per centum per annum, and may secure the same by a deed of trust or mortgage upon the whole *or any portion of their property.*" This provision, it will be seen, authorized the Company to embrace in its mortgages, its property other than claims against the stockholders.

This provision of the mortgage, is declared by the apppellant to be a fraud on him, although if he be entitled to be a stockholder, as he claims, it relieves him of personal liability.

And so also, the attempt to get equity jurisdiction by the charge that the stock subscriptions were made without due advertisement, is futile. By the 4th section of the said act, the corporators were authorized "to open subscription for such *time and on such advertisement* as may *seem best to them.*"

It will also be seen by section 1106 of the Code of Virginia, relied on by the appellant, that the thirty days' notice there required is only where the Act of Assembly incorporating the company also appoints commissioners to receive subscriptions to the capital stock. These commissioners were persons other than the corporators, and by section 1112 the corporation had

no existence until the subscribers received by the commissioner shall have met in general meeting.

None of these provisions apply to the charter of the Traction Company, in which no commissioners were appointed to organize the company, but it was incorporated the moment the Mayor signed the ordinance, and the incorporators were authorized to receive the subscriptions. So no notice of opening the books was required in this case. None is required by the general law of corporations, and none by the act of incorporation, but the matter is left to the discretion of the corporators. Had the provision of the Code applied, there could have been no organization of the company within the ten days required by the ordinance, as the Code requires thirty days notice of time and place of subscription to stock.

Upon the whole case we ask that the decree of the United States Circuit Court of Appeals for the Fourth Circuit be affirmed, without the permission to seek relief in a court of law.

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of the Appellees.

APPENDIX.

AN ACT

To authorize the Common Council of Richmond to authorize persons to construct Railroads in the streets of said city.

[Passed March 20, 1860.]

1. *Be it enacted by the General Assembly*, That the Common Council of the city of Richmond shall have the power to authorize any person or companies to construct railroads in the streets of the city of Richmond under such provisions, restrictions and limitations as the Council may prescribe; and when such persons or companies are so authorized to construct such railroads, the said persons or companies, with such persons as may unite with them, shall be a corporation, with the powers and duties, and for the time prescribed and authorized by their agreement with the said Council, and shall be governed by the provisions of chapters 56 and 57 of the Code, so far as the same are applicable to such corporations and not inconsistent with this act; provided, that the mere grant of authority to one such company shall not prevent the Council from authorizing other persons or companies to construct other such railroads in the streets of the city.

2. Any persons or companies authorized by the Council to construct such railroads, may, with the consent of the County Court of Henrico, extend their road or roads into the county of Henrico any distance not exceeding ten miles, and may use steam as their motive power outside the corporate limits of the city; provided, that in constructing their road within the limits of the city the same shall be done on the line and under such restrictions as the Council may prescribe.

3. The company or companies so constituted may pur-

chase, lease, hold, sell, and convey, lease out and rent out real estate, not exceeding at any one time five acres in the city of Richmond, not more than one acre of which shall be in one body, and five hundred acres in the county of Henrico.

4. The capital stock of any such company shall not be less than twenty thousand dollars, nor more than three hundred thousand dollars, to be divided into shares of fifty dollars each. The corporators in any such companies, or the majority of them, may cause books of subscription to the stock of such company to be opened at such places in the city of Richmond, for such time, and on such advertisement, as may seem best to them; and the stockholders, in general meeting, may prescribe the officers of such company and their respective duties, the number of directors, and the votes to which stockholders shall be entitled.

5. The said company or companies may at any time borrow money for the purpose of building, equipping or extending their roads, and issue bonds therefor, bearing interest not exceeding eight per centum per annum, and may secure the same by a deed of trust or mortgage upon the whole or any portion of their property.

6. This act shall be in force from its passage.

Copy—teste:

P. H. GIBSON,
Clerk of House of Delegates and
Keeper of the Rolls of Va.